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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-684

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT AND/OR THE SUPREME COURT OF FLORIDA

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, THIRD DISTRICT AND/OR THE SUPREME COURT OF FLORIDA

PETITIONER prays that a Writ of Certiorari issue to review the judgment herein of the District Court of Appeal, Third District, of the State of Florida, entered in the above case on November 21, 1972, Petition for Rehearing denied on December 21, 1972, and/or to review the judgment herein of the Supreme Court of Florida entered in the above case on May 11, 1973, Petition for Rehearing denied on July 26, 1973.

OPINIONS BELOW

The judgment of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in which that Court granted a Final Judgment in favor of the Respondents, is unreported and appears in Appendix A. The Opinion of the Florida District Court of Appeal, Third District, affirming the Final Judgment of the Circuit Court is reported at 269 So.2d 704 (Fla.App. 3rd 1972) and appears in Appendix B. The Order denying Petitioner's petition for rehearing appears at Appendix C. The Order of the Florida Supreme Court granting the Respondents' motion to dismiss Petitioner's appeal is unreported and appears in Appendix D.[1] The Order denying Petitioner's petition for rehearing on the order of dismissal appears in Appendix E. The Opinion of the Florida Supreme Court denying Petitioner's Petition for Certiorari for lack of jurisdiction is reported at 277 So.2d 284 and appears in Appendix F. The Order of the Florida Supreme Court denying Petitioner's petition for rehearing on the order denying the Petition for Certiorari appears in Appendix G.

[1]The Respondents' motion to dismiss Petitioner's appeal to the Florida Supreme Court asserted not only lack of jurisdiction (under Article 5, Section 4 (2) of the Florida Constitution, which defines the jurisdiction of the Supreme Court, that Court is given jurisdiction, *inter alia*, in cases where the lower court has construed a "controlling provision of" the Florida or United States Constitutions) but also argued that the Court should dismiss the appeal because of certain outstanding and unpurged contempt orders entered against Petitioner. The Florida Supreme Court Order granting the motion to dismiss does not specify the ground for the dismissal. Although Petitioner's Petition for Rehearing on the Order of dismissal asked the Court to specify the grounds for the dismissal the Court refused to do so. Obviously, if the dismissal was based on grounds other than lack of jurisdiction this Court's Writ of Certiorari would properly be directed to the Supreme Court of Florida. Consequently, under these circumstances, the Petitioner requests this Court to issue a Writ of Certiorari, jointly or severally, to either the District Court of Appeal or to the Supreme Court of Florida so there will be no doubt regarding this Court's jurisdiction.

JURISDICTION

The Judgment to be reviewed was made and entered by the Florida District Court of Appeal on November 21, 1972. An Order denying a timely motion for rehearing was made and entered on December 21, 1972. Petitioner filed a timely notice of appeal from the decision of the Florida District Court of Appeal to the Supreme Court of Florida. An Order dismissing this appeal was entered by the Supreme Court of Florida on May 11, 1973. An Order denying a timely petition for rehearing of the order of dismissal was made and entered on July 26, 1973. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question is 28 U.S.C.A. §1257(3).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The pertinent language contained in the constitutional provisions involved is as follows:

United States Constitution, Article 6:

> "This Constitution, and the Laws of the United States which shall be in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Amendment XIV, Section 1:

> "Section 1. . . . No State shall make or enforce any Law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws."

Articles 7 and 13 of the Treaty of Peace, Amity, Navigation and Commerce (9 Stat. 881, 18 *ibid.* pt. 2 *Public Treaties*, pp. 550-559) currently in force between the United States and Colombia provide as follows:

"Article 7. . . . It is likewise agreed, that it shall be wholly free for all merchants, commanders of ships, and other citizens of both countries to manage by themselves or agents their own business in all the ports and places subject to the jurisdiction of each other, as well with respect to the consignments and sale of their goods and merchandise by wholesale or retail, as with respect to: the loading, unloading and sending off their ships; they being, in all these cases, to be treated as citizens of the country in which they reside, or at least to be placed on an equality with the subjects or citizens of the most favored nation."

"Article 13. . . . Both contracting parties promise and engage formally to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of one or the other, transient or dwelling therein, leaving open and free to them the tribunals of justice for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country; for which purpose they may

either appear in proper person or employ in the prosecution or defense of their rights such advocates, solicitors, notaries, agents and factors as they may judge proper in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions or sentences of the tribunals, in all cases which may concern them, and likewise at the taking of all examinations and evidence which may be exhibited in the said trials."

QUESTIONS PRESENTED FOR REVIEW*

1. Whether a state may, consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution and the Treaty of Peace, Amity, Navigation and Commerce (9 Stat. 881) existing between the United States and Colombia, enter a Final Judgment in an action governed by the law of a civil law jurisdiction (Colombia) when evidence of that law is not before the Court.

2. Whether a state may, consistent with the due process of law required by the Fourteenth Amendment, strike

*ADDITIONAL QUESTIONS TO BE ARGUED

IV Whether a state may, consistent with the requirements of the Due Process Clause under the Fourteenth Amendment, enter a Final Judgment in default which grants relief to parties which are not before the court and who are indispensible parties and/or the real parties in interest in the litigation.

V Whether a state may, consistent with the due process requirements of the Fourteenth Amendment, enter a Final Judgment which, *inter alia*, (a) is rendered without reference to the foreign (civil) law material to the issues presented, (b) where English translations of foreign documents plead in the Complaint have not been presented to the court, (c) where the evidence upon which damages were awarded consists of the sworn statement and testimony of an attorney who admittedly does not have personal knowledge of the material facts and, (d) grants relief to and requires actions by various entities which are not parties to the action.

a defendant's answer, enter a default judgment covering all issues in the case, and deny a defendant any opportunity to participate in a trial on damages because of the defendant's failure to purge himself from outstanding contempt orders, where those contempt orders are not entered in conjunction with discovery proceedings and the order striking the answer does not specify the authority under which it was entered.

3. Whether a state may, consistent with the requirements of due process under the Fourteenth Amendment of the United States Constitution, enter a default judgment which goes beyond the issues framed by the pleadings.

STATEMENT

Elias Ganem, Petitioner, is a Colombian citizen and resident who had the misfortune of being served with a Summons and Complaint while he was in Miami, Florida. As a consequence, he has been forced to endure and participate in protracted, expensive litigation in a foreign country at a time when he was residing in South America. The litigation is basically a fight among shareholders over the control and assets of two Colombian business entities—civil law partnerships—neither of which was ever made a party to the litigation.

Petitioner was Defendant in the Trial Court. The Respondents were Plaintiffs below.

Petitioner is seeking a review of a state court affirmance of a Final Judgment which was entered, for some 1.8 million dollars, after a final hearing of which Petitioner received approximately one-half day's advance notice and which was held one week before a scheduled trial date which the lower court had earlier refused to postpone. Immediately prior to entry of the Final Judgment, Peti-

tioner's Answer, along with his affirmative defenses, was stricken and he was prohibited from participating in the trial on damages.

All of the parties to this litigation are members of the Ganem family and are citizens and *residents* of Colombia, although the Record suggests that Elias resided in Miami for a brief period during 1968. Three of the Respondents (Herlinda Ganem de Issa, Victoria Ganem de Jacir, Susana Ganem de Viveros) and Petitioner are brother and sisters. Respondent Olga Andraus Vda. de Ganem is their mother. Her husband, Salomon Ganem, died in 1963. The Respondents will be referred to, individually, by their first names. Petitioner will generally be referred to as "Elias."

Any of the facts relating to the merits of Respondents' claim, as recited below and as argued on the appeals, must be qualified to the extent Petitioner was denied an opportunity to defend or cross-examine on the merits of the case. Consequently, the facts recited are essentially those asserted by the Respondents, which assertions have never met the test of meaningful cross-examination. Obviously, insofar as this proceeding relates to sanctions applied by the lower court the record is relatively accurate and complete.

In any event, the following statement will first summarize the historical background and business relationships of the parties (as recited in the Complaint) and then examine the nature and development of the case in the Florida courts to the extent material to this Petition.

The Complaint against Elias was filed by the Respondents in December, 1968, in the Circuit Court in Dade

[2]Petitioner argued below that the Florida Courts were obligated to take judicial notice of the fact that Colombia is a *civil* law, and not a common law, jurisdiction. The opinion of the District Court of Appeal suggests that it accepted this argument. *Ganem v. Ganem*, 269 So.2d 740, 746 (Fla.App. 3rd 1972) (citing *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725). The dissenting Judge obviously adopted this view.

County, Florida. It alleged that in 1936, Salomon, along with Olga, his wife, and Susana (Elias' mother), created a Colombian[2] partnership under the firm name of Ganem & Cia, S.A. (hereinafter referred to as "Ganem & Co."). The outstanding shares were owned by these individuals. Formation of Ganem & Co. was accomplished by filing "Public Document #360" in Cartagena, Colombia. A copy of this Public Document, written in the Spanish language, was attached to the Complaint. No English translation was ever placed in evidence. The principal place of business of Ganem & Co. was and continues to be Cartagena, Colombia. At all times material to this action it would appear that all the Respondents and Elias were partners in Ganem & Co., except for Susana, who ceased being a partner in 1950 and resumed partnership in 1963, and Olga, who ceased being a partner in January, 1963.

It is also alleged that in 1951, Salomon, Elias and a third party not involved in this action formed a Colombian limited liability company under the name of Fabrica de Manteca y Aceites Vegetales, La India, Ltd. (hereinafter "La India"). A copy of "Public Document #208," reflecting the formation of La India, was attached to the Complaint. It was also written in Spanish and no English translation was ever introduced into evidence. As with Ganem & Co., La India's principal place of business was located in Colombia. In fact, neither company has ever done business in the United States. After Salomon's death (in 1963), *Ganem & Co.* and *Elias* continued as partners of La India.

Thus, during the periods of time relevant to the instant litigation (late 1950's through the mid-1960's) the business relationships were essentially as follows: Elias and the Respondents all had ownership interests in Ganem & Co., with Elias holding a majority (over 50%) interest. Elias,

Salomon, and Ganem & Co. owned La India until Salomon's death, after which only Elias and Ganem & Co. had ownership interests. Consequently, the only interest that the individual Respondents have ever had in La India is through their minority ownership interest in Ganem & Co.

With the death of the family patriarch (Salomon) in 1963, embittered fighting erupted among the remaining members of the family over control of the Companies, culminating in this and other litigation in both Colombia and New York. The New York suit filed by the Respondents prior to the Florida action will be discussed later in this Statement.

The Respondents' principal claim, which is presented in Count I of the Complaint, is an allegation that Elias illegally transferred some $868,000.00 from a Ganem & Co. account at the New York agency of the Royal Bank of Canada to a La India account at the Montreal branch of that same Bank in 1960. It is alleged that this was a diversion of funds without authorization, without the Respondents' knowledge and in violation of a specified Public Document on file in Colombia—an English translation of which was never placed in evidence.

By their second Count, the Respondents sought to recover 80 shares of La India which they alleged Elias had transferred from Ganem & Co. to himself in 1962 for 80,000 Colombian Pesos. The 80 shares represented 40% of the outstanding shares of La India. The Complaint alleged that the consideration for this transfer was wholly inadequate and fraudulent and that, consequently, there was a breach of fiduciary relationship existing between Elias and the Respondents. This fiduciary duty supposedly arose from Elias' purported absolute control of Ganem & Co. How-

ever, there was no evidence of Colombian law ever produced to define this "fiduciary relationship," nor were English translations of the Public Documents which might establish the parameters of duty owed by Elias to the Respondents ever produced.

The fourth Count related to yet another Public Document (filed in 1963) which allegedly authorized Elias to purchase some 60 shares of La India stock from Ganem & Co. for 1,000 Colombian Pesos per share. As before, this consideration was alleged to be inadequate and the transfer in violation of a fiduciary duty owed Respondents by Elias. All but four of the shares were transferred back to Ganem & Co. seven days after the initial transfer, at the original purchase price per share. The remaining 4 shares remained in Elias' name and gave him a majority shareholding in La India, all this purportedly to the damage and injury of the Respondents.

The fifth and final Count relates to an alleged revocation, based again on a Public Document (no English translation) filed by Respondents in Colombia in 1966, of all authority originally granted to Elias to act in any capacity for Ganem & Co. or La India.

The relief demanded in the Complaint actually suggests one of the major areas of dispute in this case. It sought the following:

> (1) The return *to Ganem & Co.* of all funds allegedly transferred from Ganem & Co. to La India in the month of January, 1960.

(2) An Order directing Elias to pay *to Ganem & Co.* the difference between the fair market value and the actual consideration paid for the 80 shares of La India stock which he purchased from Ganem & Co. in 1962.

(3) An Order invalidating Olga's withdrawal as a partner of *Ganem & Co.* and requiring payment (presumably *by Ganem & Co.*) of her percentage interest with profits attributable thereto since January, 1963, or, in the alternative, an Order directing Elias (not Ganem & Co.) to pay to Olga her proportionate share of the difference between the fair market value of Olga's interest on January 15, 1963, and the amount which she was actually credited for that interest on the same date.

(4) An Order invalidating the transfer to Elias of the 60 shares of *La India* on January 16, 1963, and requiring him *to account to Ganem & Co.* for all profits attributable to those shares or, in the alternative, an Order directing Elias *to pay to Ganem & Co.* the difference between the fair market value of the four shares of La India which he transferred from Ganem & Co. to himself, and the actual consideration which he paid.

(5) An Order granting the Respondents an accounting as to Elias' dealings and transactions *with Ganem & Co., La India* and Salomon Ganem, since January 1, 1960.

Clearly, then, virtually all of the relief sought in the Complaint consists of funds and accountings which were in fact being demanded on behalf of Ganem & Co.—a company which has never been a party to the litigation.

In October, 1969, Elias filed his Answer and Affirmative Defenses. The Answer consisted of a general denial. Among the affirmative defenses alleged were an arbitration agreement, estoppel, statute of limitations and laches, lack of jurisdiction by virtue of forum non conveniens, failure to show a duty owed the Respondents by Elias, failure to join indispensable parties (Ganem & Co. and La India), and estoppel by virtue of a prior pending law suit in New York.[3]

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[3]Prior to initiating the Florida suit Respondents had filed a Complaint in the State of New York. That Complaint was virtually identical to the Florida Complaint. In New York, the Respondents sought to have Ganem & Co. and La India intervene in the suit as plaintiffs, which the lower court permitted. However, this action was unanimously reversed on appeal. The appellate court's opinion gave the following reasons for its reversal:

> "While the law of New York governs matters of procedure, the law of the country where an entity is created governs the issue of authority to act on its behalf. Where a challenge is made as to the authority to act for foreign entities on their application to intervene in a pending action in this jurisdiction, the interests of the litigants as well as proper utilization of judicial time and effort require that the question of participation be disposed of at the threshhold. It was an improvident exercise of discretion for Special Term to have granted intervention without a preliminary determination of movants' authority. Accordingly, the disposition of the motion to intervene should be withheld pending a hearing before a Special Referee to hear and report on the issue of movants' authority." *Ganem v. Ganem*, 31 App. Div.2d 605 (1968).

In the face of this, the Respondents chose to proceed with the Florida action, where they never made the Companies parties.

On March 4, 1970, and again on August 25, 1970, the trial court entered contempt Orders against Elias. The first contempt Order was entered because of Elias' failure to comply with an Order to deposit $350,000.00 with the Clerk of the Circuit Court. The second contempt Order was entered because Elias failed to account to the Respondents in accordance with a Summary Judgment for an accounting which had been entered on March 5, 1970. Elias, in declining to account, contended that he was exercising his privilege against self-incrimination by virtue of litigation pending in Colombia.

In the latter part of 1971 the trial court set the case for a trial on damages to begin on December 13, 1971. The Respondents immediately sought to have the trial date cancelled because they were, by their own admission, unable to prove their case. The Motion to Cancel was filed on November 5, 1971, and stated, *inter alia:*

> "That it is necessary and essential for the Defendant to make the aforesaid accounting in order that Plaintiffs have all of the information necessary to establish all of the damages in this action."

At the hearing on their Motion, Respondents' counsel acknowledged that he did not have the information he needed to prove his case. Nevertheless, the Motion was denied.

On November 23, 1971, the trial court entered an Order (which appears in Appendix H) stating that if Elias did not purge himself from the outstanding contempt Orders within *five* days it would strike his Answer and Affirmative Defenses and enter a Judgment for the Re-

spondents, at which time Elias would not be permitted to oppose *in any way* the Respondents' proof of damages. That Order stated in pertinent part as follows:

> "[that] . . . without further notice or hearing and upon the filing of a certificate by counsel for the Plaintiffs that Defendant has failed to so purge himself and account, this Court shall forthwith strike Defendant's answer heretofore filed in this cause and enter a Judgment against the Defendant in favor of the Plaintiffs for the relief prayed for against the Defendant as can be supported by Affidavit or Deposition to be submitted by Plaintiffs' counsel, in which event the Defendant shall be barred from submitting opposing Affidavit or testimony with respect to such damages."

The expected certificate of non-compliance was filed on December 2.

Then Respondents' counsel took the deposition of Richard Weldon, who is New York counsel for the Respondents. The deposition was based on an Affidavit which Weldon had prepared in conjunction with the deposition. In the Affidavit Weldon purported to summarize the evidence and testimony (depositions) reflected in the court file and, based on this "proof" and his computations, state the damages to which his clients were entitled.

This deposition was conducted on the afternoon of December 6, 1971—one-half day prior to entry of the Final Judgment, which was entered on the morning of December 7, 1971. Petitioner's counsel was permitted to

attend Weldon's deposition for the purpose, according to opposing counsel, of cross-examining Weldon. However, inasmuch as the deposition was based entirely on Weldon's affidavit (executed on the day of the deposition), which is a very complex document, there was no real opportunity to cross-examine. The affidavit was tendered to defense counsel at the beginning of the deposition, thus affording him no time to acquaint himself with its contents and, therefore, no meaningful opportunity to cross-examine Weldon. The following exchange between counsel at the deposition reveals the tenor of the proceeding:

> MR. LEWIS [Plaintiffs' counsel]: ". . . As I indicated to Mr. Kaplan, we are going to proceed to present, to Judge Huttoe tomorrow morning, the affidavit of Richard Weldon, together with a transcript of his deposition, together with a proposed final judgment.
>
> "The presentation of this proposed final judgment to the Court is without notice, and that lack of notice is in conformity with his Honor's order of November 23, 1971; the Defendant having failed to comply with the various court orders of contempt."
>
> MR. KAPLAN [Defendant's counsel]: "Let the record reflect that the affidavit of Richard C. Weldon, Re Damages, dated December 6th, 1971, was not transmitted to me, as counsel for the Defendant, until I walked into this deposition;
>
> "That the Defendant, notwithstanding the previous court order, does object to the entry of

any final judgment on the grounds that there is a trial being held, pursuant to court order, on trial week of December 13th;

"That notwithstanding the Court's order previously, I do not believe that the Court can enter a final judgment on depositions or on affidavits; and that the Court had previously orally stated that it would restrict my right of cross-examination."

An Order (which appears in Appendix I) striking Elias' Answer was entered on December 7. The Final Judgment was also entered on December 7. Consistent with the trial court's prior statement, Elias was not given formal notice of the Final Hearing and he was denied any opportunity to participate in it. Subsequent to entry of the Final Judgment Elias retained his present counsel.

Inasmuch as the Final Judgment is based on Weldon's Affidavit and the transcript of his deposition, a brief review of both documents is warranted. These documents contain almost no admissable evidence. Instead, they are replete with hearsay and other incompetent allegations of "fact." For example, throughout both documents Weldon relies on untranslated Spanish documents, on exchange rates for Colombian pesos which were obtained from other individuals, on allegations contained in an unverified complaint and on certain Royal Bank of Canada documents dated prior to 1961. Nowhere does the Record suggest that Weldon is proficient in the Spanish language. The exchange rates he quotes are clearly based upon several levels of hearsay. The Royal Bank of Canada documents have never been verified by that bank or by any bookkeeper of either Ganem & Co. or La India.

As for the content of the Final Judgment, in addition to requiring a wide variety of entities who were never parties to this suit to perform various acts, it awarded the Respondents damages in excess of $1,800,000.00 plus other equitable relief. It included an award of $500,000.00 based on a finding by the Court that Elias was liable to the Plaintiffs for executing certain promissory notes—despite the fact that the Complaint was never amended to state any claim based upon the notes and despite the fact that the notes were executed by Elias on behalf of Ganem & Co. or La India and none of the Respondents was a party to the notes. In excess of $100,000.00 was awarded to each of three Respondents. Elias was directed to deposit $745,000.00 with the Court, this sum being found to be the indebtedness of Elias Ganem to *La India*—a non-party (not to the Respondents). The transfers of *La India shares* to Elias were invalidated. The Royal Bank of Canada, a non-party, and its branches were required to deposit any funds they held which belonged to Elias, Ganem & Co. or La India with the Clerk and, further, to exhibit any related documents or records to Respondents' attorney. Elias was enjoined from acting in any capacity on behalf of La India or Ganem & Co.

Petitioner appealed the Final Judgment to the District Court of Appeal of Florida, Third District.[4] In that appeal Petitioner assigned every conceivable act of the lower court as error,[5] including nearly every order it had en-

[4]It is relevant to observe that prior to the appeal from the Final Judgment this case had been before the same District Court of Appeal on at least *five* occasions. The substance of those appeals is explained in the District Court's opinion: *Ganem v. Ganem*, 269 So.2d 740, 744 (footnote 2.)

[5]Under Rule 3.5c of the Florida Appellate Rules the assignments of error are to "designate identified judicial acts. . . ." Grounds for error need not be stated in the assignment.

tered, and further assigned the court's failure to apply Colombian law as error.

The federal questions herein were raised in the Brief of Appellant which was filed in the District Court of Appeal. Actually, the decision of that Court provides a fair summary of those federal questions raised:

> "1. That the court erred in entering final judgment by virtue of striking Defendant's answer and denying him an opportunity to defend on the merits, violating Florida and Federal due process and rights under a treaty of 1846 between the United States and Colombia.
>
> 2. That the court, in failing to apply Colombian law, denied Defendant Federal and Florida due process and rights under the 1846 treaty.
>
> 3. That the Plaintiffs are not the real parties in interest, but rather, the indispensable parties are the two Colombian businesses were not before the Florida circuit court.
>
> 4. That the final judgment entered went beyond the issues framed in the pleadings, thereby denying Defendant various constitutional and treaty rights.
>
> * * *
>
> 6. That the final judgment violates Article VIII, §2(b) of the Bretton Woods Agreement relating to foreign exchange controls." 269 So.2d at p. 744.

It should be pointed out that in Petitioner's brief the argument on the questions reflected in number 3 above was grounded on the Due Process Clause of the Fourteenth Amendment and on the 1846 treaty. So all of the first four questions listed above were argued in the context of due process of law under the Fourteenth Amendment.

The disposition of the foregoing questions by the Florida District Court was, of course, to hold against Petitioner's position.

Essentially, the District Court held that the trial court was justified in striking Petitioner's Answer and entering a default judgment because of his refusal to make court-ordered discovery; that the doctrine of "law of the case" and the application of the Florida rule of civil procedure providing for sanctions for failure to comply with court orders operated to justify the failure of the lower court to apply Colombian law to the issues of the case and to bar any argument as to whether La India and Ganem & Co. are the real parties in interest or indispensible parties; that the Final Judgment was supported by substantial competent evidence, so that presumably the Final Judgment did not go beyond the issues framed in the pleadings; and, finally, that it did not have to determine the issue relating to the Bretton Woods Agreement.

After the denial of his timely petition for rehearing, Petitioner sought a further review—in the Supreme Court of Florida. In a two-pronged effort, Petitioner filed both a Petition for Certiorari and a notice of appeal.[6]

[6]Article V, §4 of the Florida Constitution defines the Supreme Court's jurisdiction. Under that section the Supreme Court is given *appellate* jurisdiction over decisions of District Courts of Appeal which,

The Petition for Certiorari was denied for lack of jurisdiction and a timely petition for rehearing was likewise denied.

On the appeal, the Respondents filed a motion to dismiss the appeal and the Supreme Court granted that motion. A timely rehearing petition was denied. The order granting the motion to dismiss did not state which of the several grounds asserted in the motion was the reason for its being granted. The motion included lack of appellate jurisdiction as one ground, and this was probably the basis of the Court's action. This is particularly so in view of the fact that the remaining arguments in the motion had previously been rejected by the District Court of Appeal when a nearly identical motion to dismiss (except for the jurisdictional argument) was presented to it. This non-jurisdictional argument was to the effect that the appellate court should refuse to hear an appeal by a person who is in contempt of the lower court. Nevertheless, the action of the Florida Supreme Court on the *appeal* was ambiguous enough to cause this Petitioner to ask this Court the issue its writ to either the Florida Supreme Court or the District Court of Appeal.

The Petition for Rehearing on the dismissal order was entered on July 26, 1973.

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inter alia, initially construe a controlling provision of the State or Federal Constitution (See, *Ogle v. Pepin*, 273 So.2d 391 (Fla. 1973) for a discussion). The Court is given *certiorari* jurisdiction over any District Court of Appeals decision which ". . . is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law."

REASONS FOR GRANTING THE WRIT

POINT I

ENTRY OF A FINAL JUDGMENT IN AN ACTION GOVERNED BY THE LAW OF A CIVIL LAW JURISDICTION (COLOMBIA) IN THE ABSENCE OF EVIDENCE OR PROOF OF SUCH LAW CONFLICTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. ALTHOUGH THE QUESTION, IN A NON-DUE PROCESS CONTEXT, HAS PREVIOUSLY BEEN CONSIDERED BY THIS COURT, THIS CASE PRESENTS A FEDERAL QUESTION NOT HERETOFORE DECIDED BY THIS COURT.

The holding of the court below on the questions of whether the Florida courts erred in failing to apply Colombian law to the issues in the case reaches a result which is contrary to the decision in *Cuba Railroad Company v. Crosby*, 222 U.S. 473, 56 L. Ed. 274 (1912) a tort case in which this Court, speaking through Justice Holmes, reversed a judgment in which the lower court had applied the law of the forum in the absence of proof of Cuban law. It was held that, inasmuch as Cuba is a civil law jurisdiction, U.S. Courts were not warranted in engaging in an evidentiary presumption that would apply the law of the forum in the absence of proof of the foreign law. Not only was the court prohibited from making such a presumption, but the judgment had to be reversed because the Plaintiff, in failing to prove foreign law, had failed to prove his case. This Court's position was stated as follows:

> "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's cause, and if there is reason for doubt, he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold.
>
> "In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain, and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is same as the common law. We properly may say that we all know the fact to be otherwise." 222 U.S. 473, 479, 56 L.Ed. 274, 276.

The same holding, leading to an identical result, was achieved in *Philp v. Macri*, 261 F.2d 945, 75 ALR 2d 523 (9th Cir. 1958).

On his appeal from the Final Judgment Elias argued that the failure of the Respondents to prove Colombian law and, accordingly, the failure of the lower court to apply Colombian law to the issues presented in the case, constituted a denial of due process of law, as guaranteed by the Fourteenth Amendment of the U.S. Constitution, and a denial of rights secured to Elias under and by virtue of Articles 7 and 13 of the Treaty of Peace, Amity,

Navigation and Commerce (9 Stat. 881; 18 *Ibid.*, pt. 2, *Public Treaties*, 550-559) through USCA const. Article VI (2).

At a minimum the Due Process Clause insures a litigant fundamental fairness in the courts. Cf. *Kinsella v. United States*, 361 U.S. 234, 4 L.Ed. 2d 268. Surely a defendant from a foreign civil law country is entitled, as a matter of due process of law, to have disputes resolved in U.S. courts by application of civil law principles. The civil law jurisdictions are based on a Code of written laws which are clearly and basically different from our common law—to such an extent, it is submitted, that a failure to apply civil law principles where they are applicable constitutes such a departure from the fundamental fairness doctrine as to constitute a denial of due process. At the very least it must be conceded that there is substantial doubt as to what rights of action and what relief the Respondents would be entitled under Colombian law. It is abundantly clear from the record that the trial court never considered the question of the applicability of Colombian law. For example, it would appear that the trial judge proceeded on the assumption that the legal characteristics of the two civil law "partnerships" were essentially the same as those of common law partnerships. Actually, civil law partnerships are much more closely akin to corporations.[7]

[7]See, e.g., the Louisiana Supreme Court's opinion in *State v. Morales*, 210 So.2d 714 (La. 1970) where the following commentary appears:

> "Louisiana courts correctly resort to the common law for aid and assistance in interpretation and application of criminal statutes. The status of persons, however, is to be determined under our civilian theory. The civil law concept of a partnership which prevails in Louisiana differs from that of the common law states. The source of our theory of partnership is the

Thus, the threshold inquiry is whether the individual Respondents have any right, under Colombian law, to maintain an action against Elias for breach of fiduciary or other duty. Beyond this question of "real party in interest" is the issue of whether the partnerships, Ganem & Co. and La India, are indispensable parties to this action. Even further, there is the question of what duty, if any, is owed by a majority shareholder in a Colombian (civil law) partnership to the remaining shareholders. Petitioner takes the position that the whole question of liability is governed by

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French law, and Planiol says: 'With one exception [partnership "in participation"] commercial partnerships have been recognized as fictitious persons from time immemorial.' 2 Pt. 2 Planiol, *Treatise on the Civil Law* (La. State Law Institute tr. 1959), no. 1956. Our jurisprudence has repeatedly adhered to the concept that a partnership is a legal entity endowed with personality separate and apart from its members. The cases in Louisiana are legion which define the partnership, within the contemplation of our law, as 'a moral being,' 'a legal entity,' and 'a civil person.' It can hardly be disputed that under civil law the funds and property of a partnership are owned by the legal entity, the ideal being, recognized by fiction of law—that is, the partnership." 240 So.2d at p. 716.

The footnote to the above excerpt is also instructive:

"A partnership is a legal entity entirely separate and distinct from the persons who compose it and may have its own creditors and debtors; it alone can maintain an action on the firm's claims. *E. B. Hayes Machinery Co. v. Eastham*, 147 La. 347, 84 So. 898, and authorities cited. 'A partnership has the procedural capacity to sue to enforce its rights in the partnership name . . .' C.C.P. Art. 668; *Wolf v. New Orleans Taylor-Made Pants Co., Ltd.*, 52 LaAn. 1357, 27 So. 893. During the existence of the partnership, suit must be brought against the firm and not against the individual partners. *Key v. Box*, 14 La.An. 497. The partnership—not the partners—is the owner of partnership property. *Smith v. McMicken*, 3 La.An. 319; *Brinson v. Monroe Automobile & Supply Co.*, 180 La. 1064, 158 So. 558. A partner is an employee of the partnership for the purpose of receiving workmen's compensation. *Trappey v. Lumbermen's Mutual Casualty Co.*, 229 La. 632, So.2d 515."

Colombian law. The Florida District Court of Appeal devoted some effort to justifying its affirmation of the Final Judgment of the trial court despite the foregoing contentions of Petitioner. That court judicially noticed the fact that Colombia is a civil law jurisdiction. It also concluded that the issue of foreign law was determined by the doctrine of law of the case because the record contains some excerpts from Colombian statutes and judicial law relating to accountings, and those matters are "consistent in large part with the law of Florida." 269 So.2d at p. 746. Presumably, therefore, the Florida common law was properly applied in this civil law case. Petitioner submits that this argument is not viable. First, this court is hardly bound by the doctrine of law of the case in assessing the lower courts' actions. This is the first occasion that the case could properly be brought before this court, so that all of the prior actions of the courts below are now subject to review. Second, it is simply not reasonable to conclude, from mere excerpts of the Colombian law of accounting, that other, unrelated areas of substantive Colombian law are automatically going to be the least bit similar to our common law. The legal status of the two companies is but one example of the fallacy in this line of reasoning. Other arguments proffered by the court as possible bases for concluding that there had been sufficient proof of foreign law to warrant upholding the Final Judgment were:

a. that under certain fundamental principles which prevail in both Colombia and the United States the Respondents were entitled to relief and

b. that by failing to prove Colombian law the parties acquiesced in having the dispute determined by the law of the forum.

Conceding, arguendo, that a right of recovery against Elias exists, the fact remains that that right, under Colombian law, is possessed by Ganem & Co. and/or La India. This fact was recognized by the Respondents in their New York suit and in the ad damnum clause of their Complaint. The trial judge inherently recognized this fact in the Final Judgment, where a large portion of the relief granted was in favor of the companies. Even if there is not absolute certainty that the companies possess the cause of action, certainly the question is so substantial and basic that the failure of the lower court to resolve it, based upon Colombian law, is so fundamentally unfair that it constitutes a denial of due process.

The suggestion that the parties "acquiesced" in the application of Florida law because of their failure to prove Colombian law ignores the fact that the burden of proof was the Respondents'—not Petitioner's. If Colombia were a common law jurisdiction, then the "acquiescence" argument might be viable. But we are concerned with the civil law and it is so different from our system that that evidentiary presumption should not be operative. To attempt to apply it under such circumstances is to violate the fundamental fairness doctrine.

POINT II

ENTRY OF A FINAL JUDGMENT AFTER STRIKING A DEFENDANT'S ANSWER, ENTERING A DEFAULT JUDGMENT ON ALL ISSUES IN THE CASE AND DENYING THE DEFENDANT ANY OPPORTUNITY TO PARTICIPATE IN A TRIAL ON DAMAGES OR RECEIVE NOTICE OF SAME BECAUSE OF THE DEFENDANT'S FAILURE TO PURGE HIMSELF FROM OUTSTANDING CONTEMPT ORDERS, WHERE THOSE CONTEMPT ORDERS ARE NOT ENTERED IN ACCORDANCE WITH THE PROCEDURAL RULES GOVERNING IMPOSITION OF SANCTIONS AGAINST PARTIES AND THE ORDER STRIKING THE ANSWER DOES NOT SPECIFY THE AUTHORITY UNDER WHICH IT WAS ENTERED CONFLICTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The decision below reaches a result which is contrary to the rules expressed in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215 (1897), and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L.Ed. 530 (1909). The Florida District Court of Appeal relied on the *Hammond Packing* case in affirming the trial court's action in striking Petitioner's Answer and denying him any opportunity to be heard. In *Hovey v. Elliott*, this Court held that it is a violation of due process of law to enter a *decree pro confesso* after striking a defendant's answer in punishment for his contempt in refusing to comply with an Order to pay money into the Court. In so holding, this Court stated:

> "... a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer to strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of his proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of power necessarily depends." 167 U.S. 409, 413; 42 L.Ed. 215, 219.

Elsewhere the opinion distinguishes between denying a party in contempt a favor as opposed to denying him a right, the latter denial constituting a violation of due process. *Hovey v. Elliott*, 167 U.S. at pp. 436, 444.

Hovey v. Elliott stands for the rule that courts do not have the *inherent* power to strike an answer and enter a default judgment. In *Hammond Packing v. Arkansas*, *supra.*, this Court attempted to define the circumstances under which such drastic action could be taken without

violating the standards of due process of law. Thus, the latter case holds that it is constitutionally permissible to strike an answer and enter a default where a presumption of fact may be made as a result of the failure of a party to produce evidence. *Hammond Packing, etc.*, 212 U.S. at pp. 350, 351; 53 L.Ed. at pp. 545, 546. Applying this theory, the Oregon Supreme Court has made the following statement:

> "But, if there are numerous issues in a case, and a discovery is sought only as to one of these issues, the striking of the answer and the taking of judgment on all the issues, for failure to make discovery as to one, can only be justified on the theory that the judgment is given as a punishment for the failure to make discovery, and it may well be doubted whether such a proceeding can be sustained under the authorities above cited." *Anderson v. Stanwood*, 167 P. 2d at p. 318 (Or. 1946)

It is Petitioner's position that the actions of the courts below far exceeded any presumptions of fact which could be constitutionally warranted by the failure of Elias to account or to do any other act required by those courts. The issues in the case are so numerous and varied that the only conceivable basis for the drastic action taken by the lower court was to punish Elias. If the Respondents had submitted formal requests for Petitioner to admit various propositions of Colombian law and he had failed to respond, in that event it would be constitutionally permissible to assume that the law reflected in the request is true. But there is no such pleading in the record. This is only one of a myriad of issues which the lower courts eliminated in one fell swoop. It is submitted that those actions were so arbitrary and

unreasonable that the only explanation for their occurrence is that the court was trying to punish Elias for his outstanding contempts. Consequently, such action is a denial of due process of law. *Hovey v. Elliott, supra.*

Entry of the Order striking Petitioner's Answer, entering a default against him and denying him any opportunity to submit evidence exceeded the Court's authority under the applicable rule of procedure. The rule in question is Rule 1.380(b)(2) of the Florida Rules of Civil Procedure, which is fully reproduced in the District Court's opinion (Appendix B).

Petitioner would first point out that the Order imposing sanctions does not specify any rule or statute upon which the Court's action was based. It is submitted that this omission alone should render the Order unconstitutional. The rule should be very strictly construed inasmuch as it is in derogation of due process. Consequently, it should be strictly applied and the failure to make reference to the rule ought to be sufficient deviation from strict compliance as to bring it outside the realm of due process.

The Order striking the Answer makes specific reference to the prior orders with which Elias had not complied and the violation of which were the basis for the instant order.

The prior orders were as follows:

1. Order of November 23, 1971, wherein the Court ordered Petitioner to purge himself from contempt of court in the manner provided in the

Orders of August 25, 1970, and March 4, 1970, and gave him five days to comply with the Order of March 5, 1970.

2. Order of August 25, 1970, wherein Petitioner was found in contempt for failing to account (as required in the Order of March 5, 1970).

3. Order of March 4, 1970, wherein Petitioner was held in contempt for failing to deposit $350,000.00 with the Clerk.

4. Order of March 5, 1970, wherein Plaintiffs were granted a Summary Judgment for an accounting.

None of these orders was a discovery order. The only one which comes close to that is the order requiring an accounting. However, this writer's research has not located any case holding an accounting order to be a discovery order. Rule 1.380(b) provides for sanctions for failure to comply with the *discovery* rules. These orders do not fall within the scope of the discovery rules and, consequently, the court was not empowered by Rule 1.380(b) to impose the sanctions it sought to impose. Without the authority, the court's action falls within the prohibition of *Hovey v. Elliott* as a denial of due process.

This Petitioner is constitutionally entitled to have his day in court. *Armstrong v. Manzo*, (1965) 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187. The actions of the courts below denied him this right.

As matters now stand, state and federal courts are applying a wide variety of evidentiary presumptions to cases involving civil law questions. A review of the cases treated in the Comment Note appearing at 75 ALR 2d 523 ("Presumption as to law of foreign countries") illustrates the inconsistent, often confused, approaches to this question by courts at all levels. The instant case offers an opportunity to resolve this confusion.

The questions presented in this case are timely because of the continuously increasing interaction between citizens of the United States and citizens of civil law countries. In view of this it is safe to assume that the issue will arise with greater frequency in the courts of this country as time goes on. A decision now would be a significant step toward improving the administration of justice in situations involving civil law.

POINT III

ENTRY OF A FINAL JUDGMENT IN DEFAULT WHICH GOES BEYOND THE ISSUES FRAMED BY THE PLEADINGS CONFLICTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case presents the issue of whether a Final Judgment which goes beyond the issues framed by the pleadings in a case violates due process of law under the Fourteenth Amendment. Specifically, the Final Judgment awarded the Respondents some $500,000.00 as a result of certain promissory notes which the Court found Elias had improperly executed on behalf of Ganem & Co. and La India. Respondents' Complaint does not reflect any claim whatsoever

for the funds represented by these notes. Nevertheless, the Court awarded the Respondents $500,000.00 on the notes. Petitioner argued in the Courts below that such action constituted a denial of due process under the Fourteenth Amendment, but the argument was rejected. In view of the fact that the judgment against Petitioner was basically a default judgment, it is submitted that the failure to have the issue of the notes reflected in the pleadings was constitutionally impermissible. *In Re MY, D.C.MY, D.H. MY*, 162 So.2d 551 (Fla. App. 3rd 1964) and cases cited therein.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted

/s/ William E. Sadowski of

HELLIWELL, MELROSE & DEWOLF
Attorneys for Petitioner
1401 Brickell Avenue
Miami, Florida 33131

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by mail to Smathers & Thompson, 1801 DuPont Building, Miami, Florida, this ____ day of October, 1973.

_____

Attorney

APPENDIX A

(Filed December 7, 1971)

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

CASE NO. 68-19453

HERLINDA GANEM de ISSA,
VICTORIA GANEM de JACIR,
SUSANA GANEM de VIVEROS,
and OLGA ANDRAUS VDA. de GANEM,

Plaintiffs,

vs.

ELIAS GANEM,

Defendant.

FINAL JUDGMENT IN FAVOR OF PLAINTIFFS

The defendant, ELIAS GANEM, having been ordered to deposit in the office of the Clerk of this Court the sum of $350,000.00 or file security in such amount and the defendant having failed to do so and now being in contempt of this court and this court having ordered his arrest; and

The plaintiffs having been granted summary judgment on their complaint in which the defendant was directed to account to plaintiffs for his acts and transactions in connection with his administration of Ganem and Cia (Ganem & Co.) and Fabrica de Manteca y Aceites Vege-

tales "La India Ltd." (La India Ltd.), the defendant having failed to account and now being in contempt of this court for such failure and this court having ordered his arrest for a second time, and

The answer of the defendant having been stricken for his failure to comply with orders of this court and purge himself of his contempt of this court, and the plaintiffs having established to the satisfaction of this court the minimum amount of their damages by reason of the acts complained of in the complaint, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the plaintiff, OLGA ANDRAUS VDA. de GANEM and against the defendant, ELIAS GANEM, individually, in the sum of ONE HUNDRED FIFTY-FOUR THOUSAND ONE HUNDRED SEVENTY-TWO DOLLARS and 80/100ths ($154,172.80) (U.S. Dollars) together with interest at the legal rate thereon from November 30, 1971, and it is further

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the plaintiff, HERLINDA GANEM de ISSA, and against the defendant, ELIAS GANEM, individually, in the sum of ONE HUNDRED THIRTY-SIX THOUSAND TWENTY-EIGHT DOLLARS and 88/100ths ($136,028.88) (U.S. Dollars) together with interest at the legal rate thereon from November 30, 1971; and it is further

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of

the plaintiff, VICTORIA GANEM de JACIR, and against the defendant, ELIAS GANEM, individually in the sum of ONE HUNDRED THIRTY-SIX THOUSAND TWENTY-EIGHT DOLLARS and 89/100ths ($136,028.89) (U.S. Dollars) with interest at the legal rate thereon from November 30, 1971; and it is further

ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered in favor of the plaintiff, SUSANA GANEM de VIVEROS, and against the defendant, ELIAS GANEM, individually in the sum of ONE HUNDRED THIRTY-SIX THOUSAND AND TWENTY-EIGHT DOLLARS and 89/100ths ($136,028.89) (U.S. Dollars) with interest at the legal rate thereon from November 30, 1971, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, individually, and in any capacity he may have as Manager of Ganem & Co. and La India Ltd. shall within ten (10) days from the date of this Judgment deposit in the office of the Clerk of this Court the sum of SEVEN HUNDRED FORTY-FIVE THOUSAND THREE HUNDRED TWENTY-FOUR DOLLARS and 70/100th ($745,324.70) to be divided among the parties upon further Order of the Court, together with interest thereon at the rate of 6% per annum from November 30, 1971, said sum being the indebtedness of ELIAS GANEM to La India, Ltd. which said defendant, ELIAS GANEM, has incurred by reason of his unauthorized conversion of said funds to his own use, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, shall within ten (10) days

from the date of this judgment deposit in the office of the Clerk of this Court FIVE HUNDRED THOUSAND DOLLARS and NO/100ths ($500,000.00) (U.S. Dollars) to be divided among the parties upon further order of the court or file with the Clerk of this Court a bond in the principal amount of FIVE HUNDRED THOUSAND DOLLARS and NO/100ths ($500,000.00) payable to plaintiffs with good and sufficient surety thereon to be approved by the Clerk of this Court sufficient to pay all costs or damages incurred or sustained by plaintiffs as a result of the defendant, ELIAS GANEM, having executed on behalf of Ganem & Co. or La India Ltd. five (5) promissory notes dated March 22, 1968 in the sum of $50,000.00; March 22, 1968 in the sum of $100,000.00; October 16, 1969 in the sum of $50,000.00; October 16, 1969 in the sum of $100,000.00 and October 16, 1969 in the sum of $200,000.00 payable to Trans American Development Corporation, Ltd., and it is further

ORDERED, ADJUDGED AND DECREED that the transfer of eighty (80) shares of La India Ltd. which the defendant, ELIAS GANEM, as Manager of Ganem & Co. made to himself individually on August 22, 1962 for 1,000 Colombian pesos per share is hereby held to be void and of no effect; and it is further

ORDERED, ADJUDGED AND DECREED that the transfer of sixty (60) shares of La India Ltd. which the defendant, ELIAS GANEM, as Manager of Ganem & Co. made to himself individually on January 16, 1963 is hereby held to be void and of no effect; and it is further

ORDERED, ADJUDGED AND DECREED that the orders of contempt against the defendant, ELIAS GANEM,

entered by this court on the 4th day of March, 1970 and the 25th day of August, 1970 and the sanctions related thereto and contained therein shall remain in full force and effect until the defendant, ELIAS GANEM, purges himself in the manner provided in said orders, or complies with the provisions of this Final Judgment; and it is further

ORDERED, ADJUDGED AND DECREED that of the FIVE HUNDRED SIXTY-TWO THOUSAND TWO HUNDRED FIFTY-NINE DOLLARS 46/100th ($562,259.46) previously awarded to plaintiffs individually by virtue of this judgment, the sum of TEN THOUSAND NINE HUNDRED SIX DOLLARS and 29/100ths ($10,906.29) represents interest on the principal awarded in favor of the plaintiffs and against the defendant herein for the period during which the defendant stayed this proceeding for his first appeal to the Third District Court of Appeal of Florida from the 9th day of May, 1969 until the 4th day of September, 1969. Upon the payment of TEN THOUSAND NINE HUNDRED SIX DOLLARS and 29/100ths ($10,906.29) to the plaintiffs, the supersedeas bond filed in this cause on the 9th day of May, 1969 by the defendant and his surety shall be cancelled and the principal and surety thereon discharged; and it is further

ORDERED, ADJUDGED AND DECREED that any person, firm, corporation or bank, including but not limited to The Royal Bank of Canada (including any of said banks' agencies, branches, subsidiaries, affiliates or correspondents) now holding or since January 1, 1960 having held any property or funds in the name of or belonging to ELIAS GANEM, GANEM & CO. (whether styled in this manner, Ganem & Cia. or anything similar) or La India Ltd.

(whether styled in this manner, La India, Fabrica de Manteca y Aceites Vegetales "La India Ltd." or anything similar) is ordered to:

a). Deposit with the Clerk of this Court subject to the further order of the Court so much of such property or funds as they may now hold as may be necessary to satisfy the obligations of ELIAS GANEM contained in this Final Judgment; and

b). Exhibit to plaintiffs or their attorneys for the purpose of copying all documents, records, bank statements, letters of credit, documentation pertaining to withdrawals and transfer of funds pertaining to any such property of funds which are in their or its custody or control; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, is forthwith enjoined until further Order of this Court from borrowing any money in the name of LA INDIA, or GANEM & CO. or using the credit of either firm in any way, or transferring or otherwise dealing in any account belonging to either firm; and it is further

ORDERED, ADJUDGED AND DECREED that this Court retains and reserves jurisdiction of the parties and matters in issue herein to enter further orders consistent with this judgment including but not limited to an amended judgment in the event plaintiffs establish to the satisfaction of this court that the damages awarded in their favor are inadequate as a result of plaintiffs being unable to obtain the documentation and accounting as previously ordered, and it is further

ORDERED, ADJUDGED AND DECREED that the civil injunction bond dated August 27, 1970, approved by the Clerk of the Court on August 31, 1970, in the principal amount of ONE THOUSAND DOLLARS ($1,000.00) filed on behalf of the plaintiffs and their surety, NATIONAL SURETY CORPORATION, a New York corporation, is cancelled and the principals and surety thereon are discharged from all further liability thereon, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs' Cost Bond in the principal amount of FOUR HUNDRED DOLLARS ($400.00) filed on behalf of the plaintiffs and their surety, FIDELITY & DEPOSIT COMPANY OF MARYLAND, is cancelled and the principals and surety thereon are discharged from all further liability thereon, and it is further

ORDERED, ADJUDGED AND DECREED that this Final Judgment does not in any way affect the right and title of the parties to any real property or other property of Ganem & Co. or La India, Ltd. which is not the specific subject matter of this Final Judgment, and it is further

ORDERED, ADJUDGED AND DECREED that costs against the defendant, ELIAS GANEM, shall be taxed upon further motion and Order of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that as a result of the foregoing the non-jury trial of this case originally scheduled for the week of December 13, 1971 is cancelled.

DONE AND ORDERED at Miami, Florida this 7 day of December, 1971.

/s/ Illegible

Judge, Circuit Court

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972

CASE NO. 72-35

ELIAS GANEM,

Appellant,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Appellees.

Opinion filed November 21, 1972.

An Appeal from the Circuit Court for Dade County, Arthur E. Huttoe, judge.

Helliwell, Melrose & DeWolf and William E. Sadowski, for appellant.

Smathers & Thompson and William C. Lewis, Jr., for appellees.

Before BARKDULL, C.J., and PEARSON and HENDRY, JJ.

HENDRY, Judge.

This is an appeal by defendant Elias Ganem from a final summary judgment in favor of plaintiffs, who are related to him, which awarded money damages of about One Million, Eight Hundred Thousand Dollars, and other relief. The order appealed, which we reproduce in pertinent part in margin,[1] stems from adjudications of con-

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[1]"The defendant, ELIAS GANEM, having been ordered to deposit . . . [with] this Court . . . $350,000.00 or file security in such amount and the defendant having failed to do so and now being in contempt . . . and this court having ordered his arrest; and

"The plaintiffs having been granted summary judgment . . . in which the defendant was directed to account to plaintiffs for . . . transactions . . . [and] his administration to Ganem and Cia (Ganem & Co.) and Fabrica de Manteca y Aceites Vegetales 'La India Ltd.' (La India Ltd.), the defendant having failed to account and now being in contempt . . . for such failure and this court having ordered his arrest for a second time, and

"The answer . . . having been stricken for his failure to comply with orders of this court and purge himself of his contempt of this court, and the plaintiffs having established to the satisfaction of this court the minimum amount of their damages by reason of the acts complained of in the complaint, it is hereby

"ORDERED, ADJUDGED AND DECREED that judgment . . . is hereby entered in favor of the plaintiff, OLGA ANDRAUS VDA. de GANEM and against the defendant, ELIAS GANEM, individually, in the sum of ONE HUNDRED FIFTY-FOUR THOUSAND ONE HUNDRED SEVENTY-TWO DOLLARS and 80/100ths ($154,172.80) (U.S. Dollars) together with interest at the legal rate thereon from November 30, 1971, and it is further

"ORDERED, ADJUDGED AND DECREED that judgment . . . is hereby entered in favor of the plaintiff, HERLINDA GANEM de ISSA, and against the defendant, ELIAS GANEM, individually, in the sum of ONE HUNDRED THIRTY-SIX THOUSAND TWENTY-EIGHT DOLLARS and 88/100ths ($136,028.88) (U.S. Dollars) together with interest at the legal rate thereon from November 30, 1971; and it is further

"ORDERED, ADJUDGED AND DECREED that judgment . . . is hereby entered in favor of the plaintiff, VICTORIA GANEM de JACIR, and against the defendant, ELIAS GANEM, individually in the sum of ONE HUNDRED THIRTY SIX THOUSAND TWENTY-EIGHT DOLLARS and 89/100ths ($136,028.89) (U.S. Dollars) with interest at the legal rate thereon from November 30, 1971; and it is further

"ORDERED, ADJUDGED AND DECREED that judgment . . . is hereby entered in favor of the plaintiff, SUSANA GANEM de VIVEROS, and against the defendant, ELIAS GANEM, individually in the sum of ONE HUNDRED THIRTY-SIX THOUSAND AND TWENTY-EIGHT DOLLARS and 89/100ths ($136,028.89) (U.S. Dollars) with interest at the legal rate thereon from November 30, 1971, and it is further

"ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, individually, and in any capacity he may have as Manager of Ganem & Co. and La India Ltd. shall within ten (10) days from the date of this Judgment deposit . . . [with] this Court . . . SEVEN HUNDRED FORTY-FIVE THOUSAND THREE HUNDRED TWENTY-FOUR DOLLARS AND 70/100ths ($745,324.70) to be divided among the parties upon further Order . . ., together with interest thereon at the rate of 6% per annum from November 30, 1971, said sum being the indebtedness of ELIAS GANEM to La India, Ltd. which said defendant, ELIAS GANEM, has incurred by reason of his unauthorized conversion of said funds to his own use, and it is further

"ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, shall within ten (10) days from the date of this judgment deposit . . . [with] this Court FIVE HUNDRED THOUSAND DOLLARS and NO/100ths ($500,000.00) (U.S. Dollars) to be divided among the parties upon further order of the court or file with the Clerk of this Court a bond . . . of FIVE HUNDRED THOUSAND DOLLARS and NO/100ths ($500,000.00) payable to plaintiffs with good and sufficient surety thereon to be approved by the Clerk of this Court sufficient to pay all costs or damages incurred or sustained by plaintiffs as a result of the defendant, ELIAS GANEM, having executed on behalf of Ganem & Co. or La India Ltd. five (5) promissory notes dated March 22, 1968 in the sum of $50,000.00; March 22, 1968 in the sum of $100,000.00; October 16, 1969 in the sum of $50.000.00; October 16, 1969 in the sum of $100,000.00 and October 16, 1969 in the sum of $200,000.00 payable to Trans American Development Corporation, Ltd., and it is further

"ORDERED, ADJUDGED AND DECREED that the transfer of eighty (80) shares of La India Ltd. which the defendant, ELIAS GANEM, as Manager of Ganem & Co. made to himself individually on August 22, 1962 for 1,000 Colombian pesos per share is hereby held to be void and of no effect; and it is further

"ORDERED, ADJUDGED AND DECREED that the transfer of sixty (60) shares of La India Ltd. which the defendant, ELIAS GANEM, as Manager of Ganem & Co. made to himself individually on January 16, 1963 is hereby held to be void and of no effect; and it is further

"ORDERED, ADJUDGED AND DECREED that the orders of contempt against the defendant, ELIAS GANEM, entered by this court

on the 4th day of March, 1970 and the 25th day of August, 1970 and the sanctions related thereto and contained therein shall remain in full force and effect until the defendant, ELIAS GANEM, purges himself in the manner provided in said orders, or complies with the provisions of this Final Judgment; and it is further

"ORDERED, ADJUDGED AND DECREED that of the FIVE HUNDRED SIXTY-TWO THOUSAND TWO HUNDRED FIFTY-NINE DOLLARS 46/100ths ($562,259.46) previously awarded to plaintiffs individually by virtue of this judgment, the sum of TEN THOUSAND NINE HUNDRED SIX DOLLARS and 29/100ths ($10,906.29) represents interest on the principal awarded in favor of the plaintiffs and against the defendant herein for the period during which the defendant stayed this proceeding for his first appeal to the Third District Court of Appeal of Florida from the 9th day of May, 1969 until the 4th day of September, 1969. Upon the payment of TEN THOUSAND NINE HUNDRED SIX DOLLARS and 29/100ths ($10,906.29) to the plaintiffs, the supersedeas bond filed in this cause on the 9th day of May, 1969 by the defendant and his surety shall be cancelled and the principal and surety thereon discharged; and it is further

"ORDERED, ADJUDGED AND DECREED that an person, [or] firm, . . . including but not limited to The Royal Bank of Canada . . . now holding or since January 1, 1960 having held any property or funds in the name of or belonging to ELIAS GANEM, GANEM & CO. . . . or La India Ltd. . . . is ordered to:

> "a). Deposit with the Clerk of this Court subject to the further order of the Court so much of such property or funds as they may now hold as may be necessary to satisfy the obligations of ELIAS GANEM contained in this Final Judgment; and
>
> "b.) Exhibit to plaintiffs or their attorneys for the purpose of copying all . . . documentation pertaining to . . . transfer of funds pertaining to any such property or funds which are in their or its custody or control; and it is further

"ORDERED, ADJUDGED AND DECREED that the defendant, ELIAS GANEM, is forthwith enjoined until further Order . . . from borrowing any money in the name of LA INDIA, or GANEM & CO. or using the credit of either firm in any way, . . . and it is further

"ORDERED, ADJUDGED AND DECREED that this Court retains . . . jurisdiction of the parties and matters in issue herein to enter further orders consistent with this judgment . . . and it is further

"* * *

"ORDERED, ADJUDGED AND DECREED that this Final Judgment does not in any way affect the right and title of the parties to any

tempt entered against the defendant and the striking of certain of his pleadings for noncompliance with certain orders. This case has been here on other occasions.[2]

The appellant has presented for reversal the following contentions: 1. The court erred in entering final judgment by virtue of striking his answer and denying him an opportunity to defend on the merits, violating Florida and Federal rule due process and rights under a treaty of 1846 between the United States and Columbia. 2. The court, in failing to apply Colombian law, denied him Federal and Florida due process and rights under the 1846 treaty. 3. and 4. The appellee-plaintiffs are not the real parties in interest, but rather, the indispensible parties are the two Colombian businesses were not before the Florida circuit court. 5. The final judgment entered

---

real property or other property of Ganem & Co. or La India, Ltd. which is not the specific subject matter of this Final Judgment, and it is further

"ORDERED, ADJUDGED AND DECREED that costs against the defendant, ELIAS GANEM, shall be taxed upon further motion . . . and it is further

"* * *

"DONE AND ORDERED at Miami, Florida this 7 day of December, 1971."

[2]Ganem v. Ganem de Issa, Fla.App. 1969, 225 So.2d 564 (interlocutory appeal from order denying a motion to dismiss complaint on the grounds of the doctrine of forum non conveniens and the doctrine of non interference in the affairs of a foreign business entity); Ganem v. Ganem de Issa, Fla.App. 1969, 227 So.2d 366 (defendant's voluntary dismissal of interlocutory appeal from an order denying a motion to abate on the grounds of prior action pending); Ganem v. Ganem de Issa, Fla.App. 1970, 236 So.2d 153 (consolidated interlocutory appeals from an order requiring defendant to deposit into the registry of the court $350,000.00 or file a surety bond in that amount and an order finding him in contempt for failure to do so); Ganem v. Ganem de Issa, Fla.App. 1970, 239 So.2d 888 (interlocutory appeal from an order granting plaintiffs' right to an accounting); Ganem v. Ganem de Issa, Fla.App. 1971, 245 So.2d 142 (interlocutory appeal from a second order of contempt for failure of defendant to account to plaintiffs).

went beyond the issues framed in the pleadings, thereby denying him various constitutional and treaty rights. 6. The circuit court findings are clearly erroneous and not supported by substantial competent evidence. 7. The final judgment violates Article VIII, § 2(b) of the Bretton Woods Agreement relating to foreign exchange controls.

In reply, the appellees contend: 1. The court was justified in striking defendant's answer and proceeding to enter judgment against him for refusal to make court ordered discovery, et cetera. 2. The "law of the case" prevents the defendant from arguing about the failure to join the Colombian businesses as parties and about application of Colombian law. 3. Final judgment entered did not go beyond the issues framed in the pleadings. 4. Final judgment was supported by substantial competent evidence. 5. The Bretton Woods Agreement is irrelevant to this proceeding.

To begin with, we find no merit in defendant's arguments that he was denied due process. The record refutes his statements in the brief that he had only one-half day's notice that a default would be entered against him. Suffice it to say that beginning with a November 16, 1971 hearing, defendant was fully advised by the trial court of the likelihood that his pleadings would be stricken and a final judgment entered against him. Not only did defendant fail to purge himself of his various violations of court orders, but he made no other attempts to delay the entry of certain orders on December 7 and 8, 1971.

We therefore express the view that the circuit court was authorized to enter the final judgment under Rule 1.380(b)(2), Florida Rules of Civil Procedure, 30 F.S.A.

See generally: White v. Spears, Fla.App. 1960, 123 So.2d 689, 692 and Kay v. Swimmer, Fla.App. 1963, 151 So.2d 353, 354.

Nationally, the two leading cases in this area are Hammond Packing Co. v. Arkansas (1909), 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370, 15 Ann. Cas. 645 and Hovey v. Elliott (1897), 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841. These cases are discussed in: Societe Internationale Pour Participations Industrielles, et Commerciales, S.A. v. Rogers (1958), 357 U.S. 195, 209 et seq., 2 L.Ed2d 1255, 78 S.Ct. 1087; 2A Barron & Holtzhoff, Federal Practice and Procedure §§ 851-853, pp. 526 et seq. (1961), and 4 Moore, Federal Practice ¶ 37.03 [2.-4], pp. 37-61 et seq. (1972 ed.). We have fully examined these authorities and have concluded that the rule in Hammond Packing Company governs the instant case.

Moreover, it is at least arguable that this court could dismiss defendant's appeal because of the outstanding and unpurged contempt of court orders and other misconduct in the trial court, see: Morris v. Rabara, Fla.App. 1962, 145 So.2d 265 and Conde v. Full House, Inc., Fla.App. 1968, 206 So.2d 22.

We express the view, based on the foregoing authorities, that the failure to afford defendant a more complete opportunity to contest damages (than was furnished when defense counsel attended and participated in the deposition of Richard Welden, Esq. as to damages) was harmless error. If we were to reverse the judgment appealed, we would visit the defendant's sins upon the plaintiffs, who have presented at least a prima facie case as to damages. We cannot ignore that the defendant has

possession or control of the key evidence in this case, and that he refused to comply with various discovery orders.

We begin our examination of defendant's contention that the trial in refusing to apply, or allow him to prove, Colombian law resulted in a deprivation of due process and treaty rights with a consideration of the sanctions imposed under Rule 1.380(b)(2), for failure to comply with certain court orders. Rule 1.380(b)(2) provides:

> "(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions or an order made under Rule 1.350 to produce any document or other thing for inspection, copying or photographing or to permit it to be done or to permit entry upon land or other property or an order made under Rule 1.360 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:
>
> "(i) An order that the matters regarding which the questions were asked or the character or description of the thing or land or the contents of the paper or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(ii) An order denying the disobedient party the privilege of supporting or opposing designated claims or defenses or prohibiting him from introducing in evidence designated documents or things or items of testimony or from introducing evidence of physical or mental condition;

"(iii) An order striking out pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or rendering a judgment by default against the disobedient party;

"(iv) An order in lieu of any of the foregoing orders or in addition thereto directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

Under Rule 1.380(b)(2), the court was authorized in preventing the defendant from introducing evidence as to Colombian law. This does not violate due process or the treaty rights asserted under the rule of the Hammond Packing Company case, supra.

The conflicts rule of Florida is that in tort the lex loci delecto governs the action. See: Astor Electric Service, Inc. v. Cabrera, Fla. 1952, 62 So.2d 759 (en banc). The complaint alleges various tortious activities by the defendant, the most significant of which appears to be the conversion of certain funds in a New York bank account. Under the averments of the complaint a stronger case is made out that New York, rather than Colombian law applies.

Assuming arguendo, that the events involved herein occurred in Colombia, so that it was the lex loci delecto, it would be proper to take judicial notice that Colombia is not a common law, but rather a civil law jurisdiction. Therefore, it would be difficult to suppose the principles of the common law were to prevail. However, this does not conclude the inquiry, where plaintiff failed (we shall assume arguendo) to prove the applicable law of Colombia. Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725.

These presumptions have been indulged in by the courts: first, that law of Colombia is the law of the forum; second, that the law of Colombia, like all civilized countries, recognizes certain fundamental principles, such as the unlawful taking of One Million, Five Hundred Thousand Dollars (U. S.) in bank accounts belonging to family members or a family business enterprise is a basis for relief of the injured parties; and third, that the parties in failing to prove the law of Colombia [because of sanctions under Rule 1.380(b)(2), or otherwise] have acquiesced in having their dispute determined by the law of the forum. Leary v. Gledhill, supra.

Furthermore, for over three years the circuit court has had before it certain statutory and judicial law of Columbia, including law with respect to an accounting. These matters, which are in the record before us, are consistent in large part with the law of Florida. Therefore, this issue may be resolved by resort to the doctrine of the law of the case. If after all this time, defendant decides that he should have submitted other or additional proof of Colombian law, defendant cannot now claim that through his own failure, he has been deprived of due process and treaty rights.

Next, we agree with the plaintiffs that the doctrine of the law of the case bars defendant from now contesting whether the Colombian business enterprises were the real parties in interest and indispensable parties. The first appeal, Ganem v. Ganem de Issa, Fla.App. 1969, 225 So.2d 564 fully litigated those issues, and both the trial court and this court resolved them adverse to defendant.

We further agree with plaintiffs that the final judgment appealed was supported by substantial competent evidence.

We do not need to determine the issue relating to the Bretton Woods Agreement.

We have considered the record, all points in the briefs and arguments of counsel in the light of the controlling principles of law, and have concluded that no reversible error has been demonstrated. Therefore, for the reasons stated and upon the authorities cited, the judgment appealed is affirmed.

Affirmed.

BARKDULL, C. J.—dissenting.

I respectfully dissent and would reverse. I believe it was incumbent on the plaintiff in the trial court to establish the foreign law under which the cause of action arose.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1972
THURSDAY, DECEMBER 21, 1972

CASE NO. 72-35

ELIAS GANEM,

Appellant,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS and OLGA ANDRAUS VDA. de GANEM,

Appellees.

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

It is further ordered that appellant's motion to stay mandate is hereby denied.

A True Copy

ATTEST:

/s/ Signature Illegible

Clerk District Court of
Appeal, Third District

cc: Helliwell, Melrose & DeWolf
Smathers & Thompson

/h

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

APPENDIX D

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
FRIDAY, MAY 11, 1973

CASE NO. 43,262

ELIAS GANEM,

Appellant,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Appellees.

Appellees' Motion to Dismiss is granted and it is ordered that the appeal be and the same is hereby dismissed.

CARLTON, C.J., ROBERTS, ADKINS and McCAIN, JJ., concur

ERVIN, J., dissents

Y

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Arthur E. Huttoe, Judge

Smathers & Thompson
(Hon. William C. Lewis, Jr.)
Helliwell, Melrose & DeWolf
(Hon. William E. Sadowski)

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Kay D. Yent, D.C.

APPENDIX E

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1973
THURSDAY, JULY 26, 1973

CASE NO. 43,262

ELIAS GANEM,

Appellant,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Appellees.

On consideration of the petition for rehearing filed by attorneys for appellant, and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ROBERTS, ADKINS and McCAIN, JJ., Concur

ERVIN, J., Dissents

d

cc: Hon. William E. Sadowski
Hon. William C. Lewis, Jr.
Hon. W. P. Clark, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Arthur E. Huttoe, Judge

A True Copy

TEST:

/s/ Sid J. White

Clerk Supreme Court.

APPENDIX F

SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
WEDNESDAY, APRIL 11, 1973

CASE NO. 43,312
DISTRICT COURT OF APPEAL, THIRD DISTRICT
NO. 72-35

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, C.J., ERVIN, ADKINS, BOYD and McCAIN, JJ., concur

Y

CC: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Arthur E. Huttoe, Judge

Helliwell, Melrose & DeWolf
(Hon. William E. Sadowski)
Smathers & Thompson
(Hon. William C. Lewis, Jr.)

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Kay D. Yent, D C

APPENDIX G

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973
WEDNESDAY, MAY 23, 1973

CASE NO. 43,312

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, ET AL.,

Respondents.

On consideration of the Petition for Rehearing filed by attorneys for petitioner and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ERVIN, ADKINS, BOYD and McCAIN, JJ., concur

Y

CC: Helliwell, Melrose & DeWolf
(Hon. William E. Sadowski)
Smathers & Thompson
(Hon. William C. Lewis, Jr.)
Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
Hon. Arthur E. Huttoe, Judge

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: Kay D. Yent, D.C.

(THE ORDER OF THIS COURT DATED APRIL 11, 1973 HAS BEEN MAILED TO THE CLERK OF THE THIRD DISTRICT COURT OF APPEAL.)

APPENDIX H

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 68-19453 (Huttoe)

HERLINDA GANEM de ISSA, et al,
Plaintiffs,

v.

ELIAS GANEM,
Defendant.

ORDER

THIS CAUSE having come on to be heard before me upon Plaintiffs' Motion for Order Cancelling the Non-Jury Trial heretofore set by this Court, and the Court having reviewed the Motion, the file, heard argument from counsel for both parties, and being fully advised in the premises, finds:

1. That the Defendant, ELIAS GANEM, remains in contempt of this Court's Order of March 4, 1970, for failing to deposit $350,000.00 with the Clerk of this Court.

2. That the Defendant has failed to account to the Plaintiffs as order by this Court on March 5, 1970.

3. That the Defendant remains in contempt of this Court's Order dated August 25, 1970, finding said Defendant in contempt of court for failing to so account.

THEREFORE, and pursuant to the foregoing, it is ordered as follows:

1. The Plaintiffs' Motion for Order Cancelling Non-Jury Trial is denied.

2. The Defendant shall within five (5) days from the date of this Order purge himself from contempt of court in the manner so provided in this Court's Orders of August 25, 1970, and March 4, 1970, and comply with this Court's Order of March 5, 1970, otherwise, without further notice or hearing and upon the filing of a certificate by counsel for the Plaintiffs that Defendant has failed to so purge himself and account, this Court shall forthwith strike Defendant's Answer heretofore filed in this cause and enter judgment against the Defendant in favor of the Plaintiffs for the relief prayed for in the Plaintiffs' Complaint, together with damages against the Defendant as can be supported by affidavit or deposition to be submitted by Plaintiffs' counsel, in which event the Defendant shall be barred from submitting opposing affidavit or testimony with respect to said damages.

DONE AND ORDERED at Miami, Florida, this 23 day of Nov., 1971.

ARTHUR E. HUTTOE

CIRCUIT JUDGE

APPENDIX I

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

CASE NO. 68-19453

HERLINDA GANEM de ISSA,
VICTORIA GANEM de JACIR,
SUSANA GANEM de VIVEROS, and
OLGA ANDRAUS VDA. de GANEM,
Plaintiffs,

vs.

ELIAS GANEM,
Defendant.

ORDER STRIKING DEFENDANT'S ANSWER

THIS COURT on November 23, 1971, having ordered the Defendant Elias Ganem, to purge himself from contempt of court in the manner so provided by this Court's Orders of August 25, 1970, and March 4, 1970, and comply with this Court's Order of March 5, 1970, within five days from November 23, 1971, otherwise this Court ordered that it would, without further notice or hearing and upon the filing of a certificate by counsel for the Plaintiffs that Defendant had failed to so purge himself or account as aforesaid, strike Defendant's answer heretofore filed in this cause and enter a judgment against the Defendant in favor of the Plaintiffs for the relief prayed for in Plain-

tiffs' complaint and such damages as Plaintiffs might prove; and the Court having reviewed the file and the affidavit of William C. Lewis, Jr. filed on December 2, 1971, certifying that said Defendant has failed to so purge himself as aforesaid and failed to comply with the aforesaid Orders, and after being fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1). That as a result of the Defendant Elias Ganem having failed to comply with the aforesaid orders of this Court and having failed to purge himself of contempt of this Court, the answer of the Defendant Elias Ganem, heretofore served in this cause on or about March 6, 1969, is hereby stricken.

2). This Court shall forthwith enter Final Judgment in favor of the Plaintiffs and against the Defendant for such relief as can be supported by the allegations in the complaint and proof, by affidavit or deposition, of damages submitted by the Plaintiffs and for other relief consistent therewith.

DONE AND ORDERED at Miami, Dade County, Florida, on this 7 day of December, 1971.

ARTHUR E. HUTTOE

CIRCUIT COURT JUDGE

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 23 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-684

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District and/or the Supreme Court of Florida

BRIEF OF RESPONDENTS IN OPPOSITION

William C. Lewis, Jr.
SMATHERS & THOMPSON
1301 Alfred I. duPont Bldg.
Miami, Florida 33131
Attorneys for Respondents

MIAMI REVIEW — 371-4853 — 377-3721

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1973

CASE NO. 73-684

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District and/or the Supreme Court of Florida

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BRIEF OF RESPONDENTS IN OPPOSITION

INTRODUCTION

In this Brief, Respondents, HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM, Plaintiffs below, will be referred to by name or as "Respondents" and the Defendant below, ELIAS GANEM, will be referred to by name or as "Petitioner". References to the Appendix provided in Petitioner's Brief will be designated "Petitioner's Appendix". References to the Appendix provided in this Brief shall be designated "Respondent's Appendix". The numeral following the reference is the page number of the reference.

STATEMENT

The background facts are briefly as follows: Ganem and C.I.A. (Ganem & Co.) and Fabrica de Manteca y Aceites Vegetales "La India" Ltda., (La Lndia) are family businesses in Cartagena, Colombia. The Ganem family consists of the following members:

Salomon Ganem (Salomon deceased)		Olga Andraus Vda de Ganem (Olga) Respondent	
Elias Ganem (Elias) (Petitioner)	Herlinda Ganem de Issa (Respondent)	Victoria Ganem de Jacir (Respondent)	Susana Ganem de Viveros (Respondent)

All of the persons interested in Ganem & Co. and La India whether as partners, owners, managers, officers or directors, are before this Court in this proceeding.

Ganem & Co. and La India were harmoniously and successfully operated until late in 1963 when the family patriarch, Salomon Ganem, died. The Petitioner, Elias Ganem, was the managing partner of both firms and his mother and sisters relied on him to look after their interest, having each given him a broad power of attorney in 1954. After Salomon's death, Elias' sisters and mother (the Respondents) asked Elias to account for his stewardship. He refused and when their demands became insistent, he suddenly decamped from Colombia in 1966 with his wife and children without letting his mother and sisters know where he was going. It was not until 1968 that the Respondents were able to locate the Petitioner who was residing in Miami, Florida, at which time this litigation was initiated.

This Statement will focus primarily on the status of the litigation at the time of the entry of the Final Judgment (Petitioner's Appendix 1-8). In November of 1971 the Dade County, Florida Circuit Court, on its own initiative set the case for trial.

At this point in time the litigation has been in existence for three years, the Petitioner had taken six interlocutory appeals from orders of the lower court and the Third District Court of Appeal had as a result of those appeals affirmed orders of the lower court which required the Petitioner to deposit $350,000.00 into the registry of the court, which found the Petitioner in contempt of court for failing to make that deposit (Respondents' Appendix C, page 5), which affirmed a Summary Judgment (Respondents' Appendix D, page 9) on the issue of the Respondents' right to an accounting and which affirmed an order

of the lower court finding the Petitioner in contempt of court for failing to account (Respondents' Appendix E, page 13.).[1]

Immediately after the court had set the case for trial, Respondents moved for an order continuing the trial, since the Petitioner had failed to account and produce documents as ordered by the lower court. A hearing was held on Respondents' motion for a continuance. At the hearing the lower court again ordered Petitioner to produce the records of the partnership and family business which were the subject matter of prior orders of that court, the same having been affirmed by the Third District Court of Appeal of Florida.

Pursuant to that hearing the Court, on November 23, 1971, entered an order (Respondents' Appendix F, page 17) which found that the Petitioner remained in contempt of

[1]The opinions are briefly described as follows: Ganem v. Ganem de Issa, Fla.App. 1969, 225 So.2d 564 (interlocutory appeal from order denying a motion to dismiss complaint on the grounds of the doctrine of forum non conveniens and the doctrine of non interference in the affairs of a foreign business entity); Ganem v. Ganem de Issa, Fla.App. 1969, 227 So.2d 366 (defendant's voluntary dismissal of interlocutory appeal from an order denying a motion to abate on the grounds of prior action pending); Ganem v. Ganem de Issa, Fla.App. 1970, 236 So.2d 153 (consolidated interlocutory appeals from an order requiring defendant to deposit into the registry of the court $350,000.00 or file a surety bond in that amount and an order finding him in contempt for failure to do so); Ganem v. Ganem de Issa, Fla.App. 1970, 239 So.2d 888 (interlocutory appeal from an order granting plaintiffs' right to an accounting); Ganem v. Ganem de Issa, Fla.App. 1971, 245 So.2d 142 (interlocutory appeal from a second order of contempt for failure of defendant to account to plaintiffs).

a previous March 4, 1970, Order for failing to deposit $350,000.00 with the Clerk of the Court, remained in contempt of the Court's previous Order of August 25, 1970, finding the Petitioner in contempt of court for failing to account, and found that the Petitioner had failed to account to Respondents or produce documentation with respect to the family businesses as required by a previous Order of March 5, 1970. The November 23, 1971 Order denied the Respondents' motion for a continuance and ordered Petitioner within five days from the date of the Order, to purge himself from contempt and comply with the Court's Order of March 5, 1970, which required Petitioner to produce documents. Otherwise, the Court ordered that upon the filing of a certificate by counsel for the Respondents that the Petitioner had failed to comply with the Order of November 23, 1971, the Petitioner's Answer would be stricken and judgment entered against him for the relief prayed for in the Respondents' Complaint, together with damages established by affidavit or deposition, submitted by Respondents' counsel.

The Petitioner failed to comply with the Order of November 23, 1971 and Respondents' counsel filed the certificate required by the November 23rd Order. On December 6, 1971 Respondents' witness, Richard C. Welden, came to Florida from New York to have his deposition taken on notice to the Petitioner to establish Respondents' damages. The oral deposition was held and transcribed and the witness was cross-examined by Petitioner's counsel. On December 7, 1971, the lower court entered an Order striking Petitioner's Answer and thereafter, entered the Final Judgment against the Petitioner.

Prior to the Petitioner's departure in 1966 from Colombia, the Petitioner and his two sons had been observed removing papers from the office of Ganem & Co. and La India. A search of this office after Petitioner's departure revealed in an old office safe that had been used only infrequently a bundle of papers relating to bank accounts maintained by the family businesses in the New York branch of The Royal Bank of Canada. The Respondents were unable to find any recent records with respect to these accounts; however, the records found in the safe showed that in December of 1959 or January of 1960, a sum in excess of $860,000.00 was transferred from an account in The Royal Bank in the name of Ganem & Co. to an account in the name of La India. These funds had not been shown in the company's tax returns filed by the Petitioner in Colombia. In 1967 Respondents learned from Petitioner's New York counsel that the account then had a value of approximately $1,500,000.00.

From this information and the other information which was reviewed in the affidavit and deposition of Richard C. Welden, Respondent's damages were computed and Final Judgment entered by the lower court.

The Final Judgment was appealed to the Third District Court of Appeal and affirmed, 269 So.2d 704 (Fla. App. 3rd, 1972). Thereafter, the Petitioner unsuccessfully sought a Writ of Certiorari in the Supreme Court of Florida, 277 So.2d 284 (Fla. 1973) and unsuccessfully appealed to the Supreme Court of Florida, 279 So.2d 871 (Fla. 1973).

Thereafter, the Petitioner filed this Petition for Writ of Certiorari in this Court.

REASONS FOR DISMISSING OR DENYING THE PETITION FOR A WRIT OF CERTIORARI

POINT I

BY REASON OF HIS CONTINUING CONTUMACIOUS CONDUCT, PETITIONER IS NOT ENTITLED TO CALL UPON THE RESOURCES OF THIS COURT FOR A DETERMINATION OF HIS CLAIMS AND HIS PETITION SHOULD BE DISMISSED.

Over three and one-half years ago, the Petitioner failed to appear before and deposit certain funds with the trial court as directed. The court held him in contempt and directed that he be imprisoned in the County Jail of Dade County, Florida until he purged himself of his contempt. Respondents have ever since been unable to locate Petitioner in the United States while Petitioner has from afar availed himself of a series of appeals through a succession of counsel.

This Court has consistently declined to consider the merits of criminal cases in which the party seeking review has escaped "from the restraints placed upon him pursuant to the conviction." *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970); *Bonahan v. Nebraska*, 125 U.S. 692, 8 S.Ct. 1390, 31 L.Ed. 854 (1887); *Smith v. United States*, 94 U.S. 97, 24 L.Ed. 32 (1876). In the *Molinaro* case, supra, the defendant who had been convicted of abortion and was free on bail failed to surrender himself to state authorities and was considered a fugitive from justice. Under the circumstances

this Court declined "to adjudicate his case" and dismissed his appeal stating that he had become disentitled "to call upon the resources of the Court for determination of his claims."

In *Eisler v. United States*, 338 U.S. 189, 69 S.Ct. 1453, 93 L.Ed. 1897 (1949), Gerhart Eisler was convicted of contempt of congress and his petition to this Court for certiorari was granted. After the case was argued but before it was decided, Eisler fled the United States. Under the circumstances this Court ordered the case removed from the docket and the appeal was subsequently dismissed. The instant case is closely analogous to the *Eisler* case to the extent the judgment from which an appeal is sought in the instant case provides for the continuation of the orders of contempt and the sanctions related thereto. (Petitioner's Appendix, pages 4-5) Of course, the judgment also provides for money damages. However as this Court pointed out in *Molinaro v. New Jersey*, 396 U.S. 365, 366, 90 S.Ct. 498, 24 L.Ed.2d 586 (1970), supra, the rationale for refusing to consider an appeal where the appellant has escaped or fled the jurisdiction is not that there is no adjudicable case or controversy with the disappearance of the subject of the litigation but rather that the appellant's conduct had disentitled him "to call upon the resources of the Court for determination of his claims." This rationale would be as applicable to the instant case as to a criminal case.

In *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed.46 (1954), a money judgment was obtained against the Union and in supplementary proceedings the Union was directed to

deliver certain bonds to the court as security pending disposition of its appeal from the money judgment. The Union failed to deliver the bonds and was held in contempt just as the Petitioner has been in the instant case on his failure to deposit with the trial court as security $350,000 which he borrowed in Nassau. In the *National Union* case, the state supreme court dismissed the Union's appeal from the money judgment on the basis of the Union's failure to purge itself of contempt. This Court affirmed stating:

> "Petitioner's failure to deliver the specified out-of-state property to the court's receiver frustrated the state court much as the escape of a prisoner would frustrate it in attempting to review his conviction. Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration."

Petitioner has had as much of his day in court as his conduct has entitled him.[2] He has refused to testify; he has refused to post security; he has refused to produce documents; he has refused to account; he has refused to obey the orders of the trial court; he has fled the jurisdiction. Surely by now this unbroken line of contumacious conduct has disentitled Petitioner "to call upon the resources of the Court for determination of his claims" and his petition should be dismissed.

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[2]The question of whether the striking of Petitioner's answer by the trial court deprived him of any due process right is considered under Point II and is not germane to the present point.

POINT II

ON PETITIONER'S REFUSAL TO SUBMIT TO DISCOVERY, STRIKING HIS ANSWER AND RENDERING A DEFAULT JUDGMENT AGAINST HIM WAS A SANCTION IMPOSED IN ACCORDANCE WITH THE LAWS OF FLORIDA AND THE DECISIONS OF THIS COURT.

Under Rule 19 this Court has set down the considerations which will govern review on certiorari. Where the appeal is from the decision of a state court the decision must decide a federal question of substance which either has not heretofore been determined by this Court or which is decided in a way which is probably not in accord with applicable decisions of this Court.

Presumably therefore a petition for a writ of certiorari is not an occasion to argue the merits of the decision below but rather to show a novel decision on a federal question or a conflict with prior decisions of this Court.

Under Point II of his petition, Petitioner argues that he was denied due process when the trial court struck his answer and entered judgment against him. He claims this result is contrary to the rules expressed in *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) and *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909). The *Hovey* case stands for the proposition that it is a violation of due process to strike a defendant's answer and enter a *decree pro confesso* to punish him for contempt. The *Hammond* case stands for the proposition that where a defendant without

justifiable excuse fails to produce evidence necessary for orderly adjudication, striking defendant's answer and rendering a default judgment preserves rather than denies dues process. This sanction is expressly granted to the Florida courts under Rule 1.380 (b) (2) of the Florida Rules of Civil Procedure (Petitioner's Appendix, pages 16 and 17). In the decision of the Florida District Court on which the judgment appealed from is based the court referred to the *Hovey* and *Hammond* cases and other authority on the question involved and stated:

> "We have fully examined these authorities and concluded that the rule in Hammond Packing Company governs the instant case." (Petitioner's Appendix, page 15)

It's hard to see how this result can be considered either a novel decision on a constitutional point or one contrary to the decisions of this Court since the decision of the court below was expressly based on this Court's decision in the *Hammond Packing* case.

Lacking a decision that is either novel or in conflict, Petitioner can only argue the merits of the decision. However in this respect Petitioner concedes that the order striking his answer was based on his failure to obey several prior orders of the Circuit Court including one dated March 5, 1970 (affirmed by the District Court) in which the trial judge had granted summary judgment to the Respondents on their demand for an accounting and directed Petitioner to account to the Respondents and "exhibit for the purpose of copying to [Respondents] all documents, records, bank statements of and/or pertaining to or related to Ganem & Cia. * * * Fabrica de Manteca y Aceitas

Vegetales * * *." In addition, although the order striking defendant's answer didn't expressly refer to the fact, Respondents had noticed the deposition of Petitioner and on the scheduled date Petitioner had failed to appear without excuse. (Respondent's Appendix, page 3) Having refused to submit to an examination which would have covered all matters at issue, and refused to produce documents under his control and refused to account, Petitioner was clearly subject to having his answer stricken under the Florida Rules of Civil Procedure and the decisions of this Court. The fact that in addition he was in contempt of court should not give him any immunity from this sanction.

When the trial judge who had originally been assigned to this case was elected to the Florida Supreme Court, a new trial judge was assigned and on November 1, 1971 he ordered that this case be set down for trial. Respondents moved to cancel the trial because of the difficulties of proof created by Petitioner's failure to make discovery. On the hearing of Respondents' motion on November 16, 1971, Mr. Lewis (for the Respondents) pointed out that Petitioner had consistently failed to account and otherwise furnish information in spite of numerous court orders. Thereafter, the following colloquy took place (Mr. Kaplan representing the Petitioner):

> "THE COURT: You can file some pleadings with the Court, asking this Court to hold this person in contempt.
>
> "MR. LEWIS: He was already held in contempt by Judge Dekle and the Third District Court has affirmed that contempt order on two occasions.

"THE COURT: I can strike his answers and there are other punitive possibilities that would be open for me to do when he is presented to me.

"I am not going to have the thrust of this trial held up by a Defendant's failure to obey an order of this Court.

MR. LEWIS: If it please the Court, I had already filed an order requiring him to produce the records and Judge Dekle ordered him to produce the records in March of 1970, and he has failed to produce these records and this information which we need to prove our damages that are involved."

The Court admonished Petitioner's counsel that Petitioner had better produce the necessary records and information or suffer the consequences and Respondents' counsel stated:

"MR. LEWIS: The problem we have had in trying to track down these records for four years, and he still hasn't produced the necessary information, your Honor.

"THE COURT: Counsel, you haven't practiced before me, have you?

"MR. LEWIS: No sir.

"THE COURT: Prepare the order and write and say the usual pleadings. I want this case to go on.

"Mr. LEWIS: He is to produce this information when?

"THE COURT: To produce it forthwith.

"MR. LEWIS: Or what, your Honor; what exact language should be there?

"THE COURT: Or I might put him in jail.

"MR. LEWIS: He has already been threatened with jail twice, your Honor.

"THE COURT: Well, why hasn't the Sheriff picked him up?

"MR. LEWIS: We can't find him, your Honor.

"THE COURT: That's something else if you can't find him. I can strike his answers, or other things like that, but I am going to try this case. You prepare whatever order you want.

"MR. LEWIS: All right, fine, sir."

(Thereupon the hearing was concluded)

At this point the court had held Petitioner in contempt; denied him the right to support his defenses; and directed his arrest. As Petitioner persisted in his refusal to make discovery, the trial court had no sanction left to impose except to strike Petitioner's answer and enter judgment against him which it did.

The decision of the Florida District Court below with respect to the propriety of striking Petitioner's answer was based not only on this Court's decision in *Hammond Packing Company v. Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909) but also on the Florida Rules of Civil Procedure (Petitioner's Appendix, bottom of page 14) and Florida case law (Petitioner's Appendix, top of page 15). As this Court stated in *Yankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965):

> "It is undoubtedly 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.' Fox Film Corp. v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158." Cramp v. Board of Public Instruction, 368 U.S. 278, 281, 82 S.Ct. 275, 277, 7 L.Ed.2d 285."

Accordingly, the petition should be dismissed not only because the decision below as to striking defendant's answer is in harmony with prior decisions of this Court but also because it is based on an independent state ground adequate to support it.

POINT III

THE LAW APPLIED BY THE TRIAL COURT IN SUPPORT OF ITS JUDMENT HAS NOT DEPRIVED PETITIONER OF ANY CONSTITUTIONAL OR TREATY RIGHT.

Petitioner summarizes his Point I in the headnote as follows:

> "Entry of a final judgment in an action governed by the law of a civil law jurisdiction (Colombia) in absence of evidence or proof of such law conflicts with the due process clause of of the Fourteenth Amendment***."

This argument assumes:

(1) The action is governed by the law of Colombia.

(2) There is no proof of such law in the record.

With respect to these two points the District Court stated:

(1) "The conflicts rule of Florida is that in tort the lex loci delecto governs the action.*** Under the averments of the complaint a stronger case is made out that New York, rather than Colombian law applies." (Petitioner's Appendix, page 17)

(2) "Furthermore, for over three years the circuit court has had before it certain statutory and judicial law of Colombia, including law with respect to an accounting. These matters, which are in the record before us, are consistent in large part with the law of Florida. Therefore, this issue may be resolved by resort to the doctrine of the law of the case. If after all this time, defendant decides that he should have submitted other or additional proof of Colombian law, defendant cannot now claim that through his own failure, he has been deprived of due process and treaty rights." (Petitioner's Appendix, page 18)

Among the additional reasons which the District Court indicated were available to support a determination that Petitioner was not deprived of due process on the question of applicable law were the following:

(3) If Petitioner had been prevented from introducing evidence as to Colombian law, he would not thereby have been deprived of due process as this would have been a sanction authorized by his misconduct. (Petitioner's Appendix, page 17)

(4) "(T)he law of Colombia, like all civilized countries, recognizes certain fundamental principles, such as the unlawful taking of One Million, Five Hundred Thousand Dollars (U.S.) in bank accounts belonging to family members or a family business enter-

> prise is a basis for relief of the injured parties." (Petitioner's Appendix, page 18)

Petitioner claims that the holding of the court below on the question of applicable law reaches a result which is contrary to this Court's decision in *Cuban Railroad Company v. Crosby*, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274 (1912). In that case this Court held that Federal courts could not assume without proof that the law of Cuba would be the same as that of the forum, New Jersey, with respect to a complex presumption as to who bears the risk of injury where an employer has promised to replace defective machinery. However, this Court stated that it may be that in dealing with rudimentary contracts or torts made or committed abroad, such as promises to pay money or the conversion of goods, our courts would assume a liability to exist if nothing to the contrary appeared, stating: "Such matters are likely to impose an obligation in all civilized countries." The instant case involves no one other than a mother and her four children who are all before the Court. These five people comprise all persons who might have any interest in either Ganem & Co. or La India either as a partner, owner, manager, director or officer. The mother and three of the children seek an accounting from the fourth child for his conversion of funds in which all had an interest. Surely no civilized country would deny an accounting under such circumstances. Petitioner has never suggested otherwise.

To summarize, the District Court below indicated that the following grounds, among others, were available to support the judgment on the question of applicable law:

(a) There is no showing that Colombia law applies.

(b) The trial court had before it statutory and judicial law of Colombia submitted by the Petitioner.

(c) Petitioner is bound by the doctrine of the Law of the Case.

(d) By reason of Petitioner's refusal to make discovery, the trial court had the authority as a sanction to deny Petitioner the right to submit evidence on the question of governing law or any other matter.

(e) The causes of action asserted by Respondents in this case are so basic as to be recognized in all civilized countries.

The first two grounds are factual; the second two are matters of state law; and the last is recognized in this Court's decision in *Cuba Railroad Company v. Crosby*, 222 U.S. 473, 32 S.Ct., 132, 56 L.Ed. 274 (1912), supra, and of course the first four grounds distinguish the *Cuba Railroad Company* case from the instant case. Accordingly, the decision below on the question of applicable law is in harmony with prior decisions of this Court and also is based in part on independent state grounds adequate to support it.

In addition to his due process argument, Petitioner also claims that he has been deprived of rights secured to him by virtue of Articles 7 and 13 of the Treaty of

Peace, Amity, Navigation and Commerce with Colombia. The fact is Petitioner's rights under the Treaty are considerly more narrow than under the United States Constitution. For example, under Article 13 of the Treaty (cited on pages 4 and 5 of the Petition for Certiorari) citizens have the right only "to be present at the decisions or sentences of the tribunals, in all cases which may concern them* * *." When the predecessor to the present Treaty with Colombia was first negotiated in 1824, the Americans suggested that citizens "have the right to be present at the proceedings in such cases* * *." The Colombians indicated that such complete access to judicial proceedings would not be permitted under Colombian law. Accordingly the narrow right to be present only at the decision has been carried over into the present Treaty. R. Wilson, United States Commercial Treaties and International Law, pages 228-229 (1960).

Rather than giving Petitioner any additional rights, the Treaty imposes upon him the specific obligation to submit himself "to the laws, decrees and usages" established.[3] This the Petitioner has refused to do.

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[3]Article 3rd

The two high contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens of each may frequent all the coasts and countries of the other, and reside and trade there, in all kinds of produce, manufactures and merchandize; and that they shall enjoy, all the rights, privileges and exemptions, in navigation and commerce, which native citizens do or shall enjoy, submitting themselves to the laws, decrees and usages there established, to which native citizens are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by the parties respectively according to their own separate laws.

Treaty of Peace, Amity, Navigation and Commerce (9 Stat. 881, 18 ibid. pt. 2 Public Treaties, pp. 550-559)

POINT IV

THE DIRECTION IN THE FINAL JUDGMENT FOR THE PAYMENT INTO COURT OF $500,000.00 IS ENCOMPASSED IN RESPONDENTS' DEMAND IN THE COMPLAINT FOR AN ACCOUNTING.

In Point III of his petition, Petitioner alleges that the Final Judgment awarded $500,000.00 to the Respondents individually based on certain promissory notes payable to Trans American and that there is no cause of action in the Complaint to cover this award.

Defendant misreads the Final Judgment. It does not award the $500,000.00 to Respondents individually. The Final Judgment provides:

> "Ordered, adjudged and decreed that the defendant, Elias Ganem, shall within ten (10) days from the date of this judgment deposit in the office of the Clerk of this Court Five Hundred Thousand Dollars and No/100th ($500,000.00) (U.S. Dollars) to be divided among the parties upon further order of the court***" or post a bond in the amount of $500,000.00. (Petitioner's Appendix, pages 3, 4).

The question of the ultimate disposition of this sum and any effect such disposition may have on the Trans American notes has been reserved for further proceedings before the lower court. Accordingly, Petitioner is in no way prejudiced.

The direction in the Final Judgment quoted above is encompassed in Respondent's fifth cause of action in the Complaint for an accounting.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be dismissed or denied.

Respectfully submitted,

SMATHERS & THOMPSON
Attorneys for Respondents
1301 duPont Building
Miami, Florida 33131

By
Of Counsel

CERTIFICATE OF SERVICE

I CERTIFY that ~~a copy~~ 3 copies of the foregoing has been furnished by mail to William E. Sadowski, Esq., Helliwell, Melrose & Dewolfe, Attorneys for Petitioner, 1401 Brickell Avenue, Miami, Florida 33131, this 23 day of November, 1973.

Of Counsel

APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 68-19453
(Judge Huttoe)

HERLINDA GANEM de ISSA, et al.,

Plaintiffs,

v.

ELIAS GANEM,

Defendant.

RE-NOTICE OF TAKING DEPOSITION

TO: STANLEY KAPLAN, ESQ.
Attorney for Defendant
305 Biscayne Building
Miami, Florida 33130

HANSFORD D. TYLER, ESQ.
Attorney for Defendant
303 Biscayne Building
Miami, Florida 33130

PLEASE TAKE NOTICE that at 10:00 A.M. on Wednesday, March 31, 1971, at the offices of SMATHERS & THOMPSON, 1301 duPont Building, Miami, Florida, the Plaintiffs will take the deposition of the Defendant, ELIAS GANEM, upon oral examination before Mrs. Edwin W. Priestley, Notary Public, or any other notary public or officer authorized by law to take depositions

in the State of Florida. The oral examination will continue from day to day until completed. This deposition is being taken for purposes of discovery, for use at trial, or for such other purposes as are permitted under the rules of court.

WE CERTIFY that a true copy of this Notice of Taking Deposition was mailed to addressees herein this 10 day of March, 1971.

SMATHERS & THOMPSON
1301 duPont Building
Miami, Florida 33131

Attorneys for Plaintiffs

APPENDIX B

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 68-19453

HERLINDA GANEM de ISSA, et al.,

Plaintiffs,

-vs-

ELIAS GANEM,

Defendant.

CERTIFICATE OF NON-APPEARANCE

This is to certify that I, Harris N. Horvath, Certified Shorthand Reporter and Notary Public, did, pursuant to Notice, duly appear at the offices of Smathers & Thompson, 1301 Alfred I. duPont Building, Miami, Florida, on Wednesday, March 31, 1971, at 10:00 o'clock a.m., for the purpose of taking the deposition of Elias Ganem.

The taking of the deposition having been set for 10:00 o'clock a.m., the undersigned thereupon waited until 10:20 a.m., in the presence of William C. Lewis, Jr., Esq., attorney for the Plaintiffs, at which time I was excused by counsel, the deponent, ELIAS GANEM, not having appeared by that hour.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in the City of Miami, County of Dade, State of Florida, this 31st day of March, 1971.

/s/ Harris N. Horvath

HARRIS N. HORVATH, CSR and Notary Public in and for the State of Florida at Large

My Notary Commission expires:
September 2, 1972

HARRIS N. HORVATH, C S R
Suite 130-A, Security Trust Building
Miami, Florida 33132

APPENDIX C

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 68-19453 — Judge Dekle

HELINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS and OLGA ANDRAUS VDA de GANEM,

Plaintiffs,

vs

ELIAS GANEM,

Defendant.

ORDER OF CONTEMPT AGAINST DEFENDANT, ELIAS GANEM

THIS CAUSE having come on to be heard before me on February 26, 1970 at 1:15 P.M., upon the Rule to Show Cause dated February 25, 1970 directing the Defendant, ELIAS GANEM, to appear before this Court on February 26, 1970 to show cause why he should not be held in contempt of Court for failure to comply with this Court's Order of February 4, 1970, which directed said Defendant, within ten (10) days from the date of said Order, to deposit $350,000.00 with the Clerk of this Court or file with said Clerk a bond in the principal of $350,000.00 payable to Plaintiffs, and counsel for the Plaintiffs having stated to this Court that the rule to show cause was personally served by Plaintiffs' counsel on STANLEY P. KAPLAN, ESQ., as attorney for the Defendant on February

25, 1970, in accordance with the provisions of said Order, and the Court having heard the testimony of plaintiffs' witness concerning efforts to locate the Defendant, and the Court having found that the Defendant cannot be found by said Plaintiffs and that Defendant's counsel declines to disclose the whereabouts of said Defendant, and the Defendant having failed to appear at the hearing on the rule to show cause or submit by Affidavit or through his attorney any explanation or justification for his failure to appear; and after hearing argument of counsel for both parties, reviewing the file and being otherwise advised in the premises and it appearing that the Defendant has wilfully disobeyed the Order of this Court dated February 4, 1970 by failing to deposit with the Clerk of this Court $350,000.00 or file with said Clerk a bond in the principal of $350,000.00 payable to Plaintiffs, (nor has said Defendant shown he is unable to comply with said Order) now, therefore, it is

ORDERED AND ADJUDGED that the Defendant, ELIAS GANEM, is guilty of the contempt of Court charged against him in having wilfully disobeyed the provisions of this Court's Order of February 4, 1970 and the Defendant, ELIAS GANEM, is found to be in contempt of this Court and is in contempt of this Court; and it is further

ORDERED AND ADJUDGED that the Defendant may purge himself of contempt by compliance with the provisions of this Court's Order of February 4, 1970 within ten (10) days after service of a copy of this Order upon Defendant's attorneys, STANLEY P. KAPLAN, ESQ., and HANSFORD D. TYLER, JR., ESQ., and it is further

ORDERED AND ADJUDGED that in the event the defendant fails to so purge himself of this contempt as aforesaid, said defendant shall be and suffer imprisonment in the County Jail of Dade County, Florida, until he shall have purged himself of said contempt by complying with and performing all of the provisions of said Order of this Court dated February 4, 1970 or having personally satisfied this Court as to his inability to comply with said order, and it is further

ORDERED AND ADJUDGED that the Sheriff of Dade County, Florida is hereby directed to incarcerate the Defendant, ELIAS GANEM, in accordance with and pursuant to the terms and conditions of this Order.

DONE AND ORDERED at Miami, Dade County, Florida, on this 4 day of March, 1970.

HAL P. DEKLE

Circuit Court Judge

APPENDIX D

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 68-19453 — Judge Dekle

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA de GANEM,

Plaintiffs,

vs

ELIAS GANEM,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT AS TO PLAINTIFFS' RIGHT TO ACCOUNTING

THIS CAUSE having come on to be heard before me upon the Motion for Summary Judgment filed on behalf of the Plaintiffs in the above-styled cause and after hearing argument of counsel for the parties hereto, reviewing the file and the deposition of Herlinda Ganem de Issa taken on January 21, 1970 and being advised in the premises, the Court finds that there is no genuine issue as to any material fact as to the right of the Plaintiffs to an accounting from the Defendant, ELIAS GANEM, for all of his dealings and transactions since January 1, 1960 with respect to the affairs of Ganem & Co. and La India, and with respect to any matter, including the transfer of funds in which Ganem & Co. and La India had any interest, and, therefore, it is

ORDERED AND ADJUDGED as follows:

1. That Plaintiffs' Motion for Summary Judgment is hereby granted as to Plaintiffs' right to an accounting from the Defendant for all of his dealings and transactions since January 1, 1960 with respect to the affairs of Ganem & Co. and La India, and with respect to any matter, including the transfer of funds in which Ganem & Co. and La India had any interest, and interlocutory decree granting said accounting is hereby issued forthwith.

2. That the Defendant, ELIAS GANEM, shall forthwith and no later than ten (10) days from the date of this Order, account to Plaintiffs for all of his dealings and transactions since January 1, 1960 with respect to the affairs of Ganem & Co. and La India and with respect to any matter, including but not limited to, the transfer of funds in which Ganem & Co. and La India has or ever has had an interest and in connection therewith but not by way of limitation, the Defendant shall forthwith exhibit for the purpose of copying to Plaintiffs all documents, records, bank statements of and/or pertaining to or related to Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.) Fabrica de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda.) (or companies in which said entities have or had any interest) which are in Defendant's custody or control and including but not limited to, any and all records in the possession of the Defendant pertaining to or related to any funds which are or have been on deposit in the name of Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.), Fabrica

de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda.) in the Royal Bank of Canada, including any of said bank's agencies, branches, subsidiaries or affiliates or any other banking institution, and Defendant shall make available to Plaintiffs forthwith but not later than ten (10) days from the date of this Order, the examination of any account in any bank, institution, corporation or partnership in which Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.), Fabrica de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda) has had an account since January 1, 1960.

3. That the Defendant, ELIAS GANEM, shall forthwith but no later than ten (10) days from the date of this Order, deposit in the Registry of this Court all funds of Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.), Fabrica de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda) which are presently in said Defendant's possession or control, including but not limited to any funds in accounts in the Royal Bank of Canada, including any of said bank's agencies, branches and subsidiaries or any other banking institution, either in the name of Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.) and Fabrica de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda).

4. That all banking institutions, including the Royal Bank of Canada and any of said bank's agencies, branches, subsidiaries or affiliates, having possession of the afore-

said funds shall forthwith but no later than ten (10) days from the date of this Order, deposit same in the Registry of this Court and make available to Plaintiffs or their attorneys any records pertaining to accounts of Ganem & CIA (whether styled in this manner or any other, including Ganem & Co.) and Fabrica de Manteca y Aceites Vegetales (whether styled in this manner or any other, including La India or La India Ltda) which said entities have had in any of said banking institutions from January 1, 1960.

5. That the Court reserves jurisdiction and consideration of all other allegations of Plaintiffs' Complaint until the aforesaid accounting as ordered herein has been made by the Defendant.

6. That as a result of the foregoing, the Non-Jury Trial of this cause originally scheduled for the week of March 9, 1970 is cancelled and postponed, to be reset at a later date.

DONE AND ORDERED at Miami, Dade County, Florida, on this 5 day of March, 1970.

HAL P. DEKLE

Circuit Court Judge

APPENDIX E

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. 68-19453 (Dekle)

HERLINDA GANEM de ISSA,
VICTORIA GANEM de JACIR,
SUSANA GANEM de VIVEROS,
and
OLGA ANDRAUS VDA de GANEM,
Plaintiffs,

v.

ELIAS GANEM,
Defendant.

ORDER OF CONTEMPT AGAINST ELIAS GANEM

THIS CAUSE having come on to be heard before me on July 31, 1970, at 2:30 o'clock, P.M., upon the Rule to Show Cause issued the Defendant, ELIAS GANEM, the Court does hereby make the following findings of fact and ruling:

1. That this Court entered on March 5, 1970, a Summary Judgment in favor of the Plaintiffs wherein the Defendant, ELIAS GANEM, was ordered to, within ten (10) days, account to the Plaintiffs and deposit in the registry of this Court all funds of GANEM & CO. and La INDIA which were in the Defendant's possession or control.

2. That on March 23, 1970, the Defendant filed in this cause a sworn Affidavit styled "Defendant's Accounting," dated March 18, 1970, wherein the Defendant declined to respond to the aforesaid Summary Judgment on the grounds that such response might tend to incriminate him.

3. That upon motion of the Plaintiffs, this Court entered a Rule to Show Cause issued to Defendant, ELIAS GANEM, on the 22nd day of June, 1970, and thereafter amended by Order of this Court on the 24th day of July, 1970, directing said Defendant to appear before this Court on the 31st day of July, 1970, to show cause why he should not be held in contempt of court for failure to comply with the aforementioned Summary Judgment dated March 5, 1970.

4. That on July 14, 1970, the Defendant filed his Affidavit dated July 3, 1970, and styled "Defendant's Response to Rule to Show Cause."

AFTER hearing arguments of counsel for both parties, reviewing the file and being otherwise advised in the premises, now therefore, it is

ORDERED AND ADJUDGED that the Defendant, ELIAS GANEM, is guilty of the contempt of court charged against him and having willfully disobeyed the provisions of this Court Order of March 5, 1970; and the Defendant, ELIAS GANEM, is found to be in contempt of this Court and is in contempt of this Court; and, it is, further,

ORDERED AND ADJUDGED that Defendant may purge himself of contempt by compliance with the provisions of this Court's Order of March 5, 1970, within ten (10) days after service of a copy of this Order upon Defendant's attorney, STANLEY P. KAPLAN, ESQ., and, it is, further,

ORDERED AND ADJUDGED that in the event the Defendant fails to so purge himself of this contempt as aforesaid, the Defendant shall be and suffer imprisonment in the county jail of Dade County, Florida, until he shall have purged himself of said contempt by complying with and performing all of the provisions of said Order of this Court dated March 5, 1970, or having personally appeared before and satisfied this Court as to his inability to comply with said Order, and, it is, further,

ORDERED AND ADJUDGED that the Sheriff of Dade County, Florida, is hereby directed to incarcerate the Defendant, ELIAS GANEM, in accordance with and pursuant to the terms and conditions of this Order, and, it is, further,

ORDERED AND ADJUDGED that the ora tenus motion of counsel for the Defendant for a stay and setting of superseadus as to this Order be and the same is hereby denied.

DONE AND ORDERED at Miami, Dade County, Florida, this the 25 day of August, 1970.

s/ Hal P. Dekle

Judge of the Circuit Court

APPENDIX F

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 68-19453 (Huttoe)

HERLINDA GANEM de ISSA, et al,
Plaintiffs,

v.

ELIAS GANEM,
Defendant.

ORDER

THIS CAUSE having come on to be heard before me upon Plaintiffs' Motion for Order Cancelling the Non-Jury Trial heretofore set by this Court, and the Court having reviewed the Motion, the file, heard argument from counsel for both parties, and being fully advised in the premises, finds:

1. That the Defendant, ELIAS GANEM, remains in contempt of this Court's Order of March 4, 1970, for failing to deposit $350,000.00 with the Clerk of this Court.

2. That the Defendant has failed to account to the Plaintiffs as order by this Court on March 5, 1970.

3. That the Defendant remains in contempt of this Court's Order dated August 25, 1970, finding said Defendant in contempt of court for failing to so account.

THEREFORE, and pursuant to the foregoing, it is ordered as follows:

1. The Plaintiffs' Motion for Order Cancelling Non-Jury Trial is denied.

2. The Defendant shall within five (5) days from the date of this Order purge himself from contempt of court in the manner so provided in this Court's Orders of August 25, 1970, and March 4, 1970, and comply with this Court's Order of March 5, 1970, otherwise, without further notice or hearing and upon the filing of a certificate by counsel for the Plaintiffs that Defendant has failed to so purge himself and account, this Court shall forthwith strike Defendant's Answer heretofore filed in this cause and enter judgment against the Defendant in favor of the Plaintiffs for the relief prayed for in the Plaintiffs' Complaint, together with damages against the Defendant as can be supported by affidavit or deposition to be submitted by Plaintiffs' counsel, in which event the Defendant shall be barred from submitting opposing affidavit or testimony with respect to said damages.

DONE AND ORDERED at Miami, Florida, this 23 day of Nov., 1971.

ARTHUR E. HUTTOE

Circuit Judge

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
DEC 11 1973
MICHAEL RODAK, JR., CLERK

in the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-684

ELIAS GANEM,

Petitioner,

vs.

HERLINDA GANEM de ISSA, VICTORIA GANEM de JACIR, SUSANA GANEM de VIVEROS, and OLGA ANDRAUS VDA. de GANEM,

Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District and/or the Supreme Court of Florida

REPLY BRIEF OF PETITIONER

HELLIWELL, MELROSE & DeWOLF
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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1973

CASE NO. 73-684

ELIAS GANEM,

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Respondents.

On Petition for Writ of Certiorari to the Florida District Court of Appeal, Third District and/or the Supreme Court of Florida

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The same references and symbols as were used in the Petition for a Writ of Certiorari will be utilized in this Reply Brief. In addition, references to the Respondents' Brief will be through use of the symbol "R.B."

STATEMENT

Respondents have repeatedly contended that the fact (assumed by Petitioner for the sake of argument) that all persons interested in Ganem & Co. and La India are before the Court in essence "cures" any defect in the proceedings resulting from the fact that the companies have never been parties to the suit [R.B. 2] Petitioner does not accept this argument and invites the Court's attention to the New York litigation (Petition, p. 12) where the Respondents' effort to cause the companies to enter the proceedings was thwarted. It is submitted that inherent in the Respondents' actions in New York was a recognition of one of Petitioner's primary points of contention: that the two companies, not the Respondents, are the real parties in interest in this action or, at the very least, that the companies are indispensible parties. In either event, the absence of the companies from the litigation would constitute a defect going to the validity of the Final Judgment entered by the Florida Court.

The Respondents' Brief (beginning at R.B. 4) generally describes the grounds upon which the trial court based its action in striking Petitioner's Answer. However, since the correctness of this action involves a question of due process, the appropriate starting point is the Order itself, which is reproduced as Appendix I of the Petition

for Certiorari heretofore filed, and which should be considered in conjunction with the Order of November 23, 1971 (Appendix H of the Petition). According to these Orders the Answer was stricken because of several prior orders which held Petitioner in contempt. Tracing the contempts back, it appears that there are two principal events which precipitated the subsequent contempts.

The first is Petitioner's failure to deposit certain funds into the Court registry.

The second "event" is Petitioner's failure to comply with an Order of accounting. It is this second Order which the Respondents choose to characterize as an order of "production" [R.B. 5] in an effort to bring it within the scope of Rule 1.380(b)(2), Florida Rules of Civil Procedure (sanctions). The correct characterization of that Order, it is suggested, is material to the disposition of one of the main issues presented in this entire proceeding: the propriety of striking the Answer.

The only other part of the Respondents' characterization of the facts which warrants comment at this juncture is the reference [R.B. 6] to certain information supposedly imparted to Respondents by "Petitioner's New York counsel," to the effect that a certain bank account had a value of $1,500,000 in 1967. In fact, the Record in this case does not support that assertion. The Record does suggest that at one point, during settlement negotiations, such a sum was mentioned. However, there is nothing in the Record which permits the conclusions that those funds were in any way related to the 1959 transfer of funds mentioned in the Complaint.

REPLY TO POINT I OF RESPONDENTS' BRIEF

[BY REASON OF HIS CONTINUING CONTUMACIOUS CONDUCT, PETITIONER IS NOT ENTITLED TO CALL UPON THE RESOURCES OF THIS COURT FOR A DETERMINATION OF HIS CLAIMS AND HIS PETITION SHOULD BE DISMISSED.]

The principal argument presented in Point I of Respondents' Brief is that the Petition should be denied because of the outstanding and unpurged contempts entered against this Petitioner in the lower court. In support of this contention the Respondents cite to several criminal cases, all of which, it is submitted, are inapposite. There is a sufficient, independent body of case law dealing with the effect of *civil* contempts on appellate proceedings such that reference to criminal proceedings is totally unnecessary and unwarranted.

It should be pointed out that the identical position was taken by the Respondents in the Florida appellate courts. The one appellate court which considered the merits of the case refused to dismiss the appeal on the grounds stated. See Petitioner's Appendix B [App. 15].

However, and more importantly, it is Petitioner's position that Respondents' argument—that this case should not be reviewed by this Court due to the contempts, is not viable for the reason that Petitioner was denied due process of law in the Florida courts. The right to review (or to appeal) is not essential to due process *provided* due

process has already been accorded in the trial court. This Court recently stated the rule to be just that:

> "This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review [citations omitted]." *Lindsey v. Normet*, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862 (1972). See also *Leahigh v. Beyer*, 116 N.E.2d 458 (Ohio Ct. Com. P. 1953).

Respondents have relied primarily on the case of *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 99 L.Ed. 46, 75 S.Ct. 92 (1954). In *National Union*, the Petitioner had objected to the dismissal of its appeal by a state appellate court based on the argument that it was thereby denied due process of law. This Court offered the following commentary on the point:

> "The constitutional objection raised by petitioner was long ago considered in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841. In that case, the Supreme Court of the District of Columbia *went further and attempted to deprive a defendant of his right to answer the suit brought against him. Having stricken defendant's answer, the court entered judgment against him as a punishment for his refusal to deliver to a court-appointed receiver certain funds which were the subject matter of the litigation.* When the State of New York later refused to honor that judgment, *this Court*, in affirming the action of the Court of Appeals of New York, *held that the*

District of Columbia had deprived defendant of his property without due process of law by denying him his constitutional right to a day in court.

"The instant case does not go so far. Here the petitioner has had its day in court. The dismissal has cut off only a statutory right of review after a full trial by judge and jury. In *Hovey v. Elliott (U.S.)*, *supra*, this distinction was anticipated and room was left open for a later consideration of cases like the one before us." [Emphasis added.] 348 U.S. 37, 41, 99 L.Ed. 46, 50.

Petitioner submits that the foregoing is consistent with its previous argument, to the effect that the right to dismiss an appeal exists only if due process has been accorded in the lower court.

Therefore, it is the other issues being argued in this case which must be resolved first. If Petitioner is correct in his contention that he was denied due process of law when the lower court struck his Answer, or by the lower court's failure to apply Colombian law to the issues in this case then, it is submitted, it would not be proper for this Court to refuse to grant the Petition (on this ground alone).

REPLY TO POINT II OF RESPONDENTS' BRIEF

[ON PETITIONER'S REFUSAL TO SUBMIT TO DISCOVERY, STRIKING HIS ANSWER AND RENDERING A DEFAULT JUDGMENT AGAINST HIM WAS A SANCTION IMPOSED IN ACCORDANCE WITH THE LAWS OF FLORIDA AND THE DECISIONS OF THIS COURT.]

The Respondents' argument under this Point ignores the thrust of the matters raised in the Petition (Point II). The Respondents have simply argued that the decision below is in accord with the cited decisions of this Court.

In point of fact, Petitioner argued that the decision of the Florida Courts reaches a result which is contrary to this Court's holdings in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L.Ed. 530 (1909).

Obviously, the fact that the lower court said that it based its decision on the *Hammond Packing* case does not mean that either that Court's application or understanding of the case was correct.

The trial judge based his actions on various outstanding orders with which Elias had not complied. These orders fall into two basic categories. The first group relates to Elias' failure to comply with an order to deposit funds into the court registry. Under the holding of *Hovey v. Elliott, supra*, it is clear that the contempt order resulting

from Petitioner's failure to deposit the funds is not a constitutionally adequate basis for striking an answer and entering a default judgment.

The second category relates to Elias' failure to comply with an order to account. Respondents seek to equate such an order with an order for discovery (production of documents) so that the sanction rule in the Florida Rules of Civil Procedure can be utilized.

That argument—that the lower court had the authority to strike an answer and enter a default judgment, to be valid, requires two things. First, there must be authority vested, by statute or rule, in the lower court to strike the answer. Second, in order for the answer to be stricken and a default entered there must be presumptions of fact which can properly be made, by virtue of the failure of a party (Petitioner) to produce evidence, to support the judgment. The difficulty inherent in engaging in presumptions in the instant case is made apparent by the number and complexity of the issues presented. It is clear that the trial judge made no attempt to articulate the presumptions upon which his Final Judgment was based. He merely assumed everything against Petitioner.

Whereas Respondents recite a series of facts, or events, which tend to evoke a negative emotional response against Elias, they fail to meet the substance of Petitioner's argument.

The rule of procedure which the Florida District Court of Appeal said provided the authority for the trial court to strike Petitioner's Answer is Rule 1.380(b)(2), Florida Rules of Civil Procedure (30 F.S.A.). [App. 16]

None of the Orders of the trial court, including the Final Judgment, refers to this rule as authority for the court's actions.

Of greater significance is the fact that Rule 1.350 provides for sanctions for failure to comply with the *discovery* rules. The rule is explicit as to what discovery orders, if not complied with, may justify the striking of an answer. It includes orders for the production of documents; however, in this regard the language very carefully refers to ". . . an order made under Rule 1.350 to produce any document or thing . . ." The only order in the instant case which is remotely related to an order to produce is the summary judgment for an accounting. Petitioner submits that that judgment is not "an order made under Rule 1.350" and, as a consequence, Rule 1.380(b)(2) does not constitute authority for the court's actions in this case. Without the Rule to validate the lower court's actions the actions fall within the acts prohibited by *Hovey v. Elliott*, *supra*, as being contrary to the requirements of Due Process of Law. Respondents' Brief refers to no authority which treats accountings as orders of production within the purview of the discovery rules.

Beyond this there is the equally significant question of whether Petitioner's actions give rise to, or warrant, the incredibly broad presumptions of fact in which the trial court had to engage to justify its actions. It should be recalled that according to *Hovey v. Elliott* a court does not have the inherent power to *punish* a contemnor by striking his answer and entering a default judgment. The *Hammond Packing Company* case, however, says that such action is constitutionally permissible if, *inter alia*, where essential presumptions of fact may be made as a result of

the failure of a party to produce evidence. The Respondents do not really rebut this facet of Petitioner's argument, so he will stand by the argument contained in the Petition.

The point is that the Florida courts, in striking Petitioner's answer and entering a default judgment against him, violated the requirements of the Due Process Clause of the Fourteenth Amendment.

REPLY TO POINT III OF RESPONDENTS' BRIEF

[THE LAW APPLIED BY THE TRIAL COURT IN SUPPORT OF ITS JUDGMENT HAS NOT DEPRIVED PETITIONER OF ANY CONSTITUTIONAL OR TREATY RIGHT.]

In this Point the Respondents' attempt to respond to Petitioner's argument that the failure of the lower court to apply Colombian law to the issues in this case violated his due process and treaty rights.

It should first be pointed out that at no point do the Respondents suggest that the substantive law which would determine whether certain civil law companies, Ganem & Co. and/or La India, are the real parties in interest or indispensable parties could be anything other than that of Colombia. In fact, the Respondents' own analysis of the *Cuba Railroad Company v. Crosby*[1] case tends to substantiate Petitioner's position here. On page 18 of their Brief the Respondents, referring to the *Cuba Railroad* case, observe that it was held that Federal courts could not assume

[1]222 U.S. 473, 56 L.Ed. 274, 32 S.Ct. 132 (1912).

that Cuban law would be the same as the law of the forum, in the absence of proof of Cuban law, ". . . with respect to a complex presumption as to who bears the risk of injury . . ." in a situation involving an employer. The same observation may be made of the instant case. The question is whether U.S. courts may assume, without proof of the law of the country of incorporation, that stockholders may sue in their individual capacities where they are seeking relief on behalf of the company in which they own shares. The Florida courts made "a complex presumption" as to who may sue and, for that matter, who may be sued —without reference to the controlling *civil* law. This is precisely what the *Cuba Railroad Company* case held was not permissible and what Petitioner contends is a denial of due process of law. It is this issue that is presented in this case: is proof of foreign law, when the foreign country is a civil law jurisdiction, required by the Due Process Clause under these circumstances?

A further example of where Colombian law governs rights and liabilities is the nature and extent of the fiduciary duty, if any, owed by Elias to the Respondents or to the companies. The Respondents' Complaint alleged the existence of such a fiduciary duty, and a breach thereof. Surely it cannot be contended that the existence and nature of the duty can be determined by reference to common law. (We may properly say that we know the fact to be otherwise.)

The Respondents suggest that the fact that certain Colombian law on the matter of accounting was similar to Florida law on accounting permits the inference (and presumption) that Colombian law in other, totally unre-

lated areas would also be the same. Again, we may properly observe that such an approach is legally and logically unsound.

The Florida District Court of Appeal's effort to justify the absence of proof of Colombian law relied on the sanctions provided for under the Florida Rules of Civil Procedure. The arguments contained in Point II of the Petition and Point II of this Reply Brief offer adequate rebuttal to that position.

Despite the fact that the Florida District Court of Appeal felt itself bound by the doctrine of law of the case on the issue of foreign law, this Court is certainly not bound by that doctrine on any of the issues presented. *Davis v. O'Hara*, 266 U.S. 314, 69 L.Ed. 303, 45 S.Ct. 104 (1924); *Southern R. Co. v. Clift*, 260 U.S. 316, 67 L.Ed. 283, 43 S.Ct. 126 (1922).

REPLY TO POINT IV OF RESPONDENTS' BRIEF

[THE DIRECTION IN THE FINAL JUDGMENT FOR THE PAYMENT INTO COURT OF $500,000 IS ENCOMPASSED IN RESPONDENTS' DEMAND IN THE COMPLAINT FOR AN ACCOUNTING.]

Respondents' statement of this issue is not accurate.

It is difficult to understand how Respondents can seriously argue that the Final Judgment did not award them $500,000 as a result of the Trans American promissory notes when the language of the Judgment specifically states that Elias is to deposit the sum with the Clerk

". . . *to be divided among the parties.*" [Emphasis added.] The fact that the actual division of the funds may be the subject of a subsequent Order does not change the substance of the Final Judgment: Elias was held liable and the Respondents ("the parties")—not the companies—were held entitled to the funds.

As to Respondents' suggestion that the Trans American promissory notes were encompassed in the fifth cause of action (accounting) in their Complaint, it should be pointed out that the notes were obligations of Ganem & Co. and La India—the absent indispensable parties. What will happen when Trans American tries to collect on the notes? Should it go against the companies? Elias? Respondents? May not Ganem & Co. and La India still bring actions against this Petitioner on the note transactions?

The Complaint is specific as to the particular activities of which the Respondents are complaining (see pages 10, 11 and 12 of the Petition). There is absolutely no reference to the notes in the Complaint. With the pleadings in that posture Respondents proceeded to a trial in which Petitioner was not permitted to participate.

CONCLUSION

In conclusion, Petitioner respectfully submits that the Respondents have *not* succeeded in demonstrating that the issues presented in this case can be decided on state as opposed to Federal grounds. Further, it is submitted that the issues presented are substantial and important issues which this Court should consider and decide and that the due process rights of which Petitioner, a foreign national, has been deprived by the Florida courts are significant and should be likewise considered by this Court.

Respectfully submitted,

_____of

HELLIWELL, MELROSE
& DeWOLF
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by mail, to William C. Lewis, Jr., Esq., Smathers & Thompson, Attorneys for Respondents, 1301 Alfred I. duPont Building, Miami, Florida, this 10th day of December, 1973.

_____

Attorney